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SUPREME COURT OF THE UNITED STATES.

No. ~~208~~ 34

LEWIS TAPPAN, PLAINTIFF IN ERROR,

vs.

JOHN BEARDSLEY AND HORACE BEARDSLEY.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

FILED FEBRUARY 1, 1860.

5 Curtis 109
15 Howe 334
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Mr Miller

SUPREME COURT OF THE UNITED STATES.

No. 437.

LEWIS TAPPAN, PLAINTIFF IN ERROR,

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IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

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A UNITED STATES OF AMERICA, *ss:*

The President of the United States of America, to the judges of the circuit court of the United States for the southern district of New York, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you, or some of you, between John Beardsley & Horace Beardsley, defendants in error, and Lewis Tappan, plaintiff in error, a manifest error hath happened, to the great damage of the said Lewis Tappan, as is said, and as appears by his complaint; we, being willing that such error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the justices of the Supreme Court of the United States, at the Capitol in the city of Washington, together with this writ, so that you have the same at the said place, before the justices aforesaid, on the first Monday of December next, that the record and proceedings aforesaid being inspected, the said justices of the Supreme Court may cause further to be done therein, to correct that error, what of right and according to the law and custom of the United States ought to be done.

Witness the Honorable Salmon P. Chase, Chief Justice of the Supreme Court of the United States, this twenty-seventh day of December, in the year of our Lord one thousand eight hundred and sixty-seven, and of the independence of the United States the ninety-first.

KENNETH G. WHITE,
Clerk of the Circuit Court of the United States of America, for the Southern District of New York, in the Second Circuit.

B JOHN BEARDSLEY & AL., def't in error,
vs.
LEWIS TAPPAN, pl'ff in error.

By virtue of the within writ of error, and in obedience thereto, I, Kenneth G. White, clerk of the circuit court of the United States for the southern dist. of New York, do hereby certify and return the judgment and proceedings in the case in the writ within mentioned, and that the following pages numbered from inclusive, contain a true and complete transcript of the record and proceedings had in said court in the above-entitled case, as the same remain of record and on file in said office.

In testimony whereof, I have caused the seal of the said court to be hereunto affixed at the city of New York, in the southern dist. of New York, in the 2d circuit, this 28 day of January, in the year of our Lord one thousand eight hundred and sixty-nine, and the independence of the said United States the ninety-third.

[SEAL.] KENNETH G. WHITE, *Clerk.*

[5-ct. int. rev. stamp canceled.]

(Indorsed:) U. S. circuit court. John Beardsley & am., def'ts in error, vs. Lewis Tappan, pl'ff in error. Writ of error. Barney, Butler & Parsons, for pl'ff in error.

The within writ is allowed. December 27, 1867.

SAM'L BLATCHFORD,
District Judge.

Filed Dec. 28, '67.

1 U. S. circuit court, southern district of New York.

LEWIS TAPPAN
ads.
JOHN BEARDSLEY AND HORACE BEARDSLEY. } Bill of exceptions.

SOUTHERN DISTRICT OF NEW YORK, *ss:*

Be it remembered that at a circuit court of the United States for the southern district of New York, held at the city hall, in the city of New York, on the twenty-fourth day of November, in the year of our Lord one thousand eight hundred and fifty-one, before the Honorable Samuel R. Betts, judge of the district court of the United States for the southern district of New York, the issues within contained joined between the said John Beardsley and Horace Beardsley, plaintiffs, and the said Lewis Tappan, defendant, came on to be tried, and the said parties by their respective attorneys, came before the said judge and the
2 jurors of the said jury, in this behalf duly summoned, also came and were then and there in due form and manner chosen and sworn to try the said issues.

And thereupon the counsel for the said plaintiffs, to maintain the issues upon their part, opened and stated the case of the said plaintiffs upon the pleadings to the jury, and it being admitted by the counsel for the defendant that a notice in writing had been previously given by the attorney for the plaintiffs to the attorney for said defendant; that the defendant would be required to produce on the trial of this action the memorandum of the book containing entries of the matters complained of in the declaration filed in this cause, or that in default of the production thereof parol evidence would be given; the counsel for the plaintiffs then called upon the defendant's counsel to produce the said book.

In compliance with such call, the counsel for the defendant then and there produced and delivered to the counsel for the plaintiffs a certain folio manuscript book, marked on the back, "Record," and on the side, "Ohio," "A to H," and exhibited to said counsel on one of the pages of said book certain reports concerning H. Beardsley & Co., Huron County, Ohio, under date of the months of July and August, 1848, all the residue of said page and of said book, except the matter of said two reports being by mutual consent so covered with envelopes as not to be exposed to be read; and thereupon the counsel for the plaintiffs produced and exhibited to witnesses as hereinafter mentioned, the said record book and the said two reports, under the circumstances and for the purposes hereinafter particularly mentioned.

The plaintiffs' counsel then called as a witness on their behalf—

Thomas Lawrence, junior, who, being sworn, testified as follows:

I am a dry-goods merchant, a jobber of the firm of S. & T. Lawrence, of this city; in 1848 I was acquainted with the firm of H. Beardsley & Co., Norwalk, Ohio; I don't think we had dealt with them previously to
3 1848, but cannot recollect; I cannot say that we had ever sold them any goods prior to the summer of 1848; I know Mr. Lewis Tappan, the defendant in this cause; in the summer or early part of the autumn of 1848 I called at Mr. Tappan's office in the Exchange Buildings, for the purpose of getting information as to the standing of H. Beardsley & Co.; this was, I think, in the month of August, perhaps July; we were subscribers to the mercantile agency; it was conducted by Mr. Tappan; I saw the clerks; I did not ask for anything; I handed

up a ticket of inquiry; they have a system of small printed tickets with blanks for name, business, and residence of party inquired about, and date and name of party making the inquiry; this ticket is handed to those in attendance, and information is given from their record-book; they usually read from the record; they on that occasion read from their record book about H. Beardsley & Co.; the record is a book like that (pointing to the record-book hereinbefore mentioned.)

The witness was here requested by the plaintiffs' counsel to read the two reports in said record-book, concerning H. Beardsley & Co., for July and August, 1848, and having done so he said:

I should think that was about the substance of the report read to me.

The plaintiff's counsel then presented the said book to his honor, the judge, who read the said two reports, after which the plaintiff's counsel took the book to his desk and offered to read the said two reports as recorded therein to the jury, to which proposed reading the counsel for the defendants objected at that stage of the examination, and insisted that before the said matters could be read in evidence to the jury, the defendant's counsel should be permitted to cross-examine the witness; the objection was sustained by the court and the said matter was not read to the jury from said book at that time.

The witness was then further examined by the plaintiff's counsel, and testified as follows:

After this I called at the office of Mr. Tappan, with Mr. Charles L. Boult, of Norwalk, Ohio; I think it was not many days after I got his report, but I don't remember how many; we saw Mr. Douglass (the confidential clerk of Mr. Tappan); I asked to see Mr. Tappan; Mr. Douglass came forward and our conversation was with him; I called this time in consequence of the report before read to me concerning H. Beardsley & Co.; Mr. Boult, an old friend of mine, happened to be in town,
4 and I made some inquiries of him concerning Beardsleys; can't say say whether the thing was casual, or whether I introduced the subject; his statements to me led to our call at Mr. Tappan's office; I broached the subject to Mr. Douglass, and also introduced Mr. Boult to Mr. Douglass at the same time; there was a conversation between Mr. Douglass and ourselves on the subject; in the absence of Mr. Tappan, Douglass was his head-man; he occupied the position of foreman, and transacted all the business of the agency in Mr. Tappan's absence; our firm were subscribers; we paid annually for the information we received; the amount is regulated somewhat by the amount of business the subscriber does; we pay them so much semi-annually; they require one dollar on one thousand dollars of the credit sales out of this city, of subscribers; we pay case, but not in advance; the commission is paid whether the sales are effected or not; these are all the terms and conditions of subscription that I know of; I believe they treat all subscribers alike; I suppose, to some extent, they take the past year's sales of the subscribers as a criterion to fix the amount; they rely on the integrity of the merchant for an estimate of his credit sales; a new subscriber pays half in advance and half at end of six months upon the amount of his sales, ascertained as nearly as can be; the commissions are calculated upon the gross amount of credit sales of the year, not restricted to amount of sales made to those as to whom we make inquiries; the conversation between Mr. Boult and myself and Mr. Douglass, so far as it related to the report concerning H. Beardsley & Co., was chiefly between Mr Boult and Mr. Douglass; Mr. Boult expressed to Mr. Douglass his surprise at the report; he said he had known Mr. John Beardsley a long

time, that he could not believe it possible that the statements in the report were true; he said he had heard from Norwalk since he had been in New York; I think he had a letter with him, but I am not positive whether it was read to Mr. Douglass or not; I did not tax my mind with it; I can't say whether the letter was read to Mr. Douglass or not; Mr. Boult said he did not believe that these matters were true; Mr. Douglass stated that he would write up to Norwalk for information (or refutation) of these reports; I can't say that anything further was said, except that Mr. Boult stated he had known John Beardsley from early life; that he was a man of energy; knew he had property, and that he made it by his own exertions; that the report must have come from some malicious source; Mr. Tappan was not present at any part of this interview; I don't remember of Mr. Douglass saying that he would communicate with Mr. Tappan; I supposed the converatsion with Mr. Douglass the same as if with Mr. Tappan.

The whole of this testimony as to conversation between Mr. Boult and Mr. Douglass was objected to by the defendant's counsel in due season as incompetent and inadmissible unless preceded or proposed to be followed by proof that the same was made known to this defendant before the commencement of this action; but the plaintiffs' counsel insisted that under the proof before given as to the relation in which Douglass stood to the defendant as his confidential and chief managing clerk, the evidence was competent and admissible without proof of the conversation being made known to the defendant, and the court so ruled and decided and admitted the evidence, to which ruling and decision the counsel for the defendant did then and there except.

I did not afterwards call with Mr. Douglass to see Mr. Tappan; I have a brother—he may have called; I afterwards called at the office for information concerning H. Beardsley & Co.; I don't recollect every receiving any request from Mr. Tappan to call; I recollect calling once; I probably called, in the whole, three or four times, and I think I called once when I saw Mr. Douglass; I then had a report read to me, but I don't recollect what it was.

The above-mentioned reports in the record-book being here shown to him by the plaintiffs' counsel, he says:

I think I heard the whole read that is here in the book; I have no doubt that all that is in the book was read to me; it all sounds familiar to me; my present best recollection is that all that is there (pointing to the reports of July and August, 1848, concerning H. Beardsley & Co., entered in the record book) I heard read.

Being cross-examined, he testified as follows:

6 I think we first subscribed for the firm in the spring of 1848; there is a kind of a printed form which they make use of; I signed my name; I have not in my possession the ticket which I wrote at the office; we surrender the ticket to the agency when we make the application; one of the terms of the subscription is that the information shall be for the sole use and benefit of the subscriber obtaining the information, in the transaction of his business; I suppose the intention of the condition is that our neighbors shall not come in and get information of us without being themselves subscribers; I never regarded the information as communicated confidentially under all circumstances.

Q. Can you state whether the reading from the book was once or at two interviews?

A. My impression is that I heard the reports read to me, one, the July report, at one time, and one, that of August, at another time; I

cannot say whether the first report was read to me by Mr. Tappan or not; I think it was read by a clerk, but it might have been by Mr. Tappan; on reflection I am inclined to think Mr. Douglass read me the first information; the book lay in such a position that I could not read it myself; the report of August I can't tell who read to me; I go in there frequently; I have sometimes called and been referred by a clerk to Mr. Tappan or Mr. Douglass; the information may not have been read from the book; it may have been read from a letter; the book is kept on the inside of a raised desk on which it stands, and the person on the outside is not in a position where he can read from it.

Q. Can you say that on either of those occasions you saw that book?

A. I presume it is the same book, but did not see the inside of it so as to know its contents; I made no efforts to see the contents; the book laid at an angle of about 40 or 45 degrees, so that a person outside the desk cannot see the inside of the book without difficulty; I did not see what he read; there is a record all the way down the page; I couldn't see from what part of the paper he read.

Being shown a paper marked No. 1, he says:

The signature to this paper is the signature of my firm, written by my brother; I presume it is the paper referred to as our subscription.

7 The paper was then read to the jury by the defendant's counsel, and is in the words and figures following:

Terms of subscription to the mercantile agency, established in the city of New York by Lewis Tappan, June, 1841.

1. Those whose annual sales of goods to persons residing in the United States and Territories, and Canada, average fifty thousand dollars or less, will severally and respectively pay fifty dollars.

2. Those whose sales, as above, are over fifty thousand dollars, will severally and respectively pay at the rate of one dollar on every thousand dollars of their sales.

3. Half of the subscription to be paid in cash, at the time of subscription, and the other half in due bills, payable in six months from the date of subscription.

4. At the time of subscription subscribers to make known what the probable amount of their entire sales will be, as above, and that amount will be assumed as the actual amount, subject, however, to the revision at the end of the year, when if the actual amount shall exceed the estimated amount, an additional sum will be paid, and if it fall short, the same shall be credited in the subscription of the following year. This does not apply however to subscriptions of $50.

5. Subscribers, as a general rule, to send all their claims, (for the security, collection or settlement of which they may need the services of an attorney,) to the attorneys recommended at the mercantile agency, it being understood that their charges and fees shall be at the rates customary in the counties where they reside.

6. The information on the books of the agency to be read at the office of the said agency to subscribers, or to such confidential clerk as may come with an order from them, subject to the regulations of said office.

7. The information furnished to subscribers, or their clerks, not
8 to be communicated by any other person, it being furnished for the subscriber only.

8. The partner of any firm who subscribes this paper, to inform all his co-partners of the terms and conditions thereof, and the clerks who

obtain information to be enjoined by the subscribers in whose employment they may be, to observe rule 7.

9. Subscribers positively agree not to inform country traders anything learned at the office, nor to allow their clerks to do so, and they also agree not to impart the information to any one who is not a subscriber to the office.

We, the subscribers, being acquainted with the objects of the said mercantile agency, in consideration of the information which shall be furnished to us, at the office of the said agency, agreeably to the regulations of the said office, do hereby agree and promise faithfully to comply with the above terms, and to pay to Lewis Tappan the several sums of money, which shall be due from us, according to the above terms of subscription.

New York, this 1st day of April, 1848.

L. & T. LAWRENCE.

Basis, $75.

Being shewn a paper marked No. 2, he says: I have seen such papers before; the paper which I said I handed in, with the name of H. Beardsley & Co. on it, at the mercantile agency, was this sort of a paper, if I used any paper; I now think I went there on an invitation from Mr. Tappan, and I think is doubtful whether I left any such ticket.

Direct-examination resumed:

I found last evening, by referring to our books, that the first goods we sold to H. Beardsley & Co. was in fall of 1847; we were not, at that time, subscribers to the agency; we became subscribers in April, 1848;
9 we made no enquiries among the spring, because Beardsley was not here; don't generally make enquiries, except when men are in town; I therefore come to the conclusion that we called to the agency by invitation, and I suppose, from Lewis Tappan, the defendant; my present impression is that we received an invitation from him; the invitation was a black ticket, filled up, and partly in writing; I suppose this ticket of invitation is at the office of Tappan; I cannot speak positively, but I have very little doubt that we received a ticket; I don't think the ticket was sealed up; such tickets were sent open, without any envelope; I once said to Mr. Douglass that these tickets ought not to be sent open; the ticket of invitation, if we received one, was presented and given up at the agency.

On further cross-examination—

Being shown a printed ticket, marked No. 3, he says: I think I have seen such paper before, but can't state positively; it is called an agency ticket of invitation.

Q. If you did receive a ticket of invitation to call at the agency, was it not in that form?

A. I think it very likely it was; I should think I must have received the invitation after I had first been to the office to make the enquiry about H. Beardsley & Co.

Re-direct:

I cannot speak positively as to the form of invitation we received; there were two forms, one for ordinary information, and the other extraordinary.

Defendant's counsel then offered to read the ticket of enquiry, marked No. 2, and the ticket of invitation, marked No. 3, which was objected to by the plaintiffs' counsel, who insisted that the original papers should be produced.

Lewis Tappan, the defendant, was then called to testify to the court as to the destruction or loss of the original tickets of enquiry and invitation, referred to by the witness. Being received by the court as competent for the purpose, he testified: That it was his uniform practice to cause tickets of enquiry from the subscribers, and of invitation from the agency, to be destroyed soon after their receipt; they were
10 temporarily placed on a wire, and kept a short time, and then destroyed to prevent accumulation; I had then, perhaps, twenty clerks; this was a standing and peremptory rule; if any ticket of enquiry was left by Lawrence it must have been destroyed, and so, also, any ticket of invitation presented by him.

After being cross-examined by plaintiffs' counsel, the court decided that the destruction of the original ticket was sufficiently proved to let in seconary proof of their contents, and that the said papers, marked No. 2 and 3, might be read in evidence.

No. 2 was then read by defendent's counsel to the jury, and is in the following words:

"MERCANTILE AGENCY.

"Lewis Tappan, No. 9 Exchange Place, New York.
Date of inquiry, ——— day of ———, 1848.
About ———————
Town ———————
County ———————
State ———————
Subscribers' signatures ———————

* Subscribers are requested to sign the above themselves, write their names at length, and fill up every blank accurately."

No. 3 was also read, as follows:

"LEWIS TAPPAN'S MERCANTILE AGENCY,
Merchant's Exchange, No. 9 Exchange Place.

Mr. ——— ———,
No. Street.

You are requested to call at my office at your leisure, if interested, to receive information respecting of whom you enquired for.

P. S. Please bring this notice."

Plaintiffs' counsel offered to read the libel from the record.

The plaintiffs' counsel then called David L. Moore, who testified as follows:

In 1848 I was salesman of William and John T. Hall, No. 51
11 Courtland street; I called at the defendant's office about the 15th of October, between the 12th and 18th of October, 1848; I desired to make enquiries relative to standing of H. Beardsley & Co., Norwalk, Ohio.

The counsel for the plaintiffs having stated that they designed to offer proof, by this witness, of a publication by the defendant of the alleged libellous matter, in the plaintiffs' declaration mentioned, the counsel for the defendant objected that the plaintiffs had already given evidence tending to show a publication by defendant to Mr. Lawrence of each of the alleged libels in the said declaration set forth, and that proof of any further or other publication of said alleged libels, or of either of them, was incompetent and inadmissible; but the plaintiffs' counsel claimed to be entitled to give evidence of any number of publications, and the court ruled and decided in accordance with such claim, and allowed the proposed evidence to be given; to which ruling and decision the counsel for the defendant did then and there except.

I made enquiries of one of the young men who was there at the desk; he had a large book before him like a large ledger; he opened it, and appeared to read from the book, or from a paper in the book; as he read, I wrote down on a slip of paper what he read; I have what he read on that occasion, and what I wrote down.

The witness here was requested by the plaintiffs' counsel to read to the jury from his memorandum, so taken down by him, but to such proposed reading the counsel for the defendant objected, on the ground that the record-book itself, in which the alleged libels were contained, had been called for by the plaintiffs' counsel, had been furnished by the defendant, and had been produced in court and exhibited to the witness, Lawrence, by the counsel for the plaintiffs, and that therefore the said record-book was the only competent evidence of the words of the said alleged libels. Which objection was then and there overruled by the court, and his honor the judge ruled and decided that the said record-book was not the only evidence of the words of the above charged libels, but that other evidence thereof was competent; to which said several rulings, and to which said decision, the counsel for the defendant then and there excepted.

The counsel for the defendant then further objected that the alleged libellous words, as contained in the record book so as aforesaid produced and delivered to the counsel for the plaintiffs, and by such counsel exhibited to the witness Lawrence, and to the court, and by them read as hereinbefore set forth, varied from the words set forth in the first and second counts of the plaintiffs' declaration, the words of the July report, as set forth in the first count of said declaration, being as follows:

"July 1848. Have been sued, Report says J Beardsley's Wife is about to apply for divorce and alimony, has put his property out of his hands, if so, their store will be closed soon."

While the words of the July report, as actually written and contained in the said record-book, were as follows:

"July 48. Has been sued. Report says that J Beardsley's Wife is abt to file a Bill for divorce and alimony, and that he has put his property out of his hands. If so, their store will proby be closed at once."

And the words of the August report, as set forth in the second count of said declaration, being as follows:

"August, 1848. Confirms prior Report to July and say in addition two more suits in Court of Common Pleas, besides those commenced by judge Baker. Mrs. Beardsley's petition for divorce will soon be filed. J. Beardsley is putting his real estate out of his hands. I do not doubt the firm has the ability to do a prosperous business, so long as they are honest, which will be as long as suits their interest."

While the words of the August report, as actually written and contained in the said record book, are:

"Aug. 7, 48. Confirms prevs Rept and says in additn two suits now in Com Pleas Court, besides those commd by Judge Baker. Mrs. B's. petitn. for a divorce will soon be filed, and I am informed Jno B. is putting his R. E. out of his hands; I don't doubt but the firm has the ability to do a prospers bus. so long as they are hont. wh. I think will be just so long as suits their int."

13 And the said counsel for the defendant did then and there insist that there was a fatal variance between the words of said alleged libels set forth in each count of the plaintiffs' declaration, and the words of said alleged libels as written and contained in said record-book, and that by reason of such variance the said plaintiffs could not maintain their aforesaid action against the defendant, and the said counsel then and there prayed the court so to decide and so to instruct and charge the jury, but this the said court refused to do, his honor the judge then and there ruling that the variance between the alleged libellous words as written and contained in defendant's record-book, and the words as set out in plaintiffs' declaration was not a fatal nor material variance; that the law in an action for a libel did not require the plaintiff to set out in his declaration the very words of the alleged libel; that it was sufficient to set them out according to their substance and effect; that in the present case the words in the declaration appeared to the court to correspond in substance and effect with the words contained in the defendant's record-book, but that it would be a question of fact for the jury whether or not the plaintiffs had proved a publication by the defendant of words corresponding in substance and effect to those set out in the declaration. To which said refusal of the court to instruct and charge the jury as prayed, and to each and every part of which said rulings and decisions of the said court the counsel for the defendant did then and there except.

D. L. Moore being further examined on the part of the plaintiffs, testified as follows:

I went to the office of Mr. Tappan between the 12th and 15th of October, 1848, for information relative to H. Beardsley & Co. of Norwalk, Ohio; the information was read to me by a clerk in the office; I wrote down what the clerk read to me in pencil; I took the pencil memorandum to my store; the clerk read very slowly and distinctly, and I wrote it down carefully with a pencil; I afterwards copied this pencil memorandum in ink; I compared the memorandum in ink with the one in pencil and found it was a correct copy; I put my finger upon the
14 lines and compared them very accurately; the pencil memorandum was torn up and destroyed; this is the memorandum which I copied from the pencil memorandum in ink; it was my custom to sign such papers with my name; I delivered this memorandum to John Beardsley about a year ago; it is in my handwriting; it is now in the same condition as when I wrote it; I wrote it from the pencil memorandum 8 or 10 days after I got the information at the office.

The memorandum was then read by the plaintiffs' counsel to the jury, and was found to correspond with the alleged libellous words in the two counts of the plaintiffs' declaration.

H. Beardsley & Co. had not been customers of the Messrs. Hall at that time; John Beardsley called there and looked at 15 or 20 hogsheads of sugar and some Young Hyson tea, 35 or 40 half-chests; he

bought the sugars and the teas at the prices I named; before I delivered them I thought it prudent to make enquiries at Mr. Tappan's relative to the standing of the house; I did not deliver the things after I got that report; the amount of the invoice of the teas and sugars were, $2,300 or $2,400; there was no other cause than that report which prevented the delivery of the goods; I had known the firm of H. Beardsley & Co. since the fall of 1846; I was in the grocery business at that time on my own account in the firm of Adams & Co.; I was a member of that firm on Saturday the 18th of November, 1848; I called with Mr. John Beardsley on Mr. Tappan at his office; Mr. Tappan was in; Mr. Beardsley inquired for Mr. Tappan; Mr. Tappan presented himself and said, "I am Mr. Tappan;" Mr. Beardsley told him that he called for the purpose of asking him to correct his report of him, that his report was doing him great injury in his business and wronging him—that it was a slander; Mr. Tappan said he "would show him before he got through that it was no slander;" he declined having any conversation in the presence of any one; he wanted to know who I was; Mr. Beardsley then told him I was Mr. Moore; he said he would see him at his private office; Mr. Tappan then (very politely) gave me to understand that he wished me to
15 go out of the office; I left the office when I was told to do so; I left Mr. Beardsley there; I saw Mr. Beardsley in five or eight minutes afterwards; I saw him opposite the office; I remained there until he came out.

Being cross-examined, he testified as follows:

I was not a subscriber to the agency of Mr. Tappan at this time; the house of Messrs. Hall were subscribers when I got the report; Mr. William Hall desired me to go for the report, and I applied at the agency in their behalf; I don't know how long they had been subscribers; I was with them two years; when I was in business in the firm of Adams, Cushmen & Co. we were subscribers; when I applied for the information about Beardsley & Co., I don't know which one of Mr. Tappan's clerks I saw; there were a great number of them; I applied by a ticket; I filled up a form like this (pointing to the subscribers' ticket hereinbefore set forth and marked No. 2) with the name of H. Beardsley & Co., and it was signed by the name of my employers; the pencil memorandum I made at the office was not out of my possession until I copied it in ink, then tore it up; when I went with Mr. Beardsley to Mr. Tappan's office Mr. Douglass was there; Mr. Tappan was sitting at the easterly part of the room; this was the room to which I would go if I went for information; Mr Tappan did not appear to know who we were; Mr. Beardsley introduced himself; he said he was of the firm of Horace Beardsley & Co., and afterwards said that he was John Beardsley; at that time I said nothing to Mr. Tappan.

Being re-examined on the part of the plaintiffs, he said:

I don't know the number of clerks who were present in the room when this conversation took place, perhaps 15 or 20; this conversation took place in the same room where the clerks were.

Samuel Furman, a witness called on the part of the plaintiffs, testified as follows:

Furman & Davis was the name of my firm in 1848; our business was that of dry-goods jobbers in this city; I knew the firm of H. Beardsley & Co., of Norwalk, Ohio; I had known them since
16 the fall of 1845; I have dealt with them since that time; I did not go to the office of Mr. Tappan in the summer of 1848; I received

a notice from Mr. Tappan requesting me to go to the office for information or important information about H. Beardsley & Co.; I gave the notice to a young man in our employ (John Dunn) and requested him to go to the office with it; I believe he left for that purpose; John Dunn is now in my employ in this city; he brought back a report; the report he brought was written in pencil; I think that report was destroyed; we preserved no copy of it; we entered no copy of it on our books; I went on the same day to the office of Mr. Tappan and had a conversation in reference to this report; I saw Mr. Douglass; I think Mr. Tappan was not in the office; this, I think, was the 15th July, 1848; I said to Mr. Douglass that I had received the report which I held in my hand from his office; I read the report to Mr. Douglass; I said, "I think you are doing this man or this firm an injury; I think this report cannot be true; it does not appear probable that Mr. Beardsley is putting his property out of his hands, as he is now paying his debts, and that we had received that morning an account from him of $500; that I understood he had sent some $2,000 or $3,000 that day, and that the $500 we had received was our portion of it;" I don't remember anything else I said; Mr. Douglass said he would tell those who called my statement, but he could not alter his books; I remember no more on that occasion; I remember nothing to have occurred afterwards in regard to that report.

The counsel for the defendant objected in due season to the evidence of the above interview and conversation with Mr. Douglass as incompetent and inadmissible as evidence against the defendant, but the objection was overruled by his honor the judge, who ruled and decided that the said evidence was competent and admissible, to which ruling and decision the counsel for the defendant did then and there except.

Cross-examined:

17 I think our firm had been two or three years subscribers previous to making this inquiry; I think I subscribed in 1846, it may have been in 1845; we continued to be subscribers up to March or April, 1851; we are not now subscribers; when we commenced to subscribe we signed the regular paper; the first subscription continued about one year; we subscribed secondly previous to 1848; I have no recollection to have signed a paper the second time. The agency invitation hereinbefore set forth and marked No. 3 being shown to the witness, he says: I saw notice like this while I was a subscriber; I cannot say the notice I received was like this; the notice I received was a printed form filled up; there were two forms; I cannot say positively what was the difference, I believe one was, "Please call at my office and receive information," &c., and the other, "Please call at my office and receive *important* information," &c.; I don't recollect whether the notice I received was for important information or not; I presume inquiry had been made at Mr. Tappan's office previous to this notice relative to H. Beardsley & Co.; I don't know that any member of the firm of H. Beardsley & Co. was in town at that time; I presume I did call for information myself previously, but have no positive recollection.

William A. Dibble, a witness for the plaintiffs, testified as follows:

My occupation is a dry-goods merchant; the name of my firm is Dibble, Frink & Co.; I am acquainted with the firm of H. Beardsley & Co.; I dealt with them; I am personally acquainted with, and know, both the members of this firm; we never received a report from Mr. Tappan con-

cerning them: we were not subscribers to Mr. Tappan's agency in 1848; in October, 1848, I called with Mr. John Beardsley at the office of Mr. Tappan; we saw on that occasion Mr. Douglass and a number of clerks; Mr. Tappan was not present; I called at the office and inquired for Mr. Tappan, and a clerk replied he was not in, but Mr. Douglass was there, who attended to the business for Mr. Tappan; Mr. Douglass, hearing his name, came forward to meet us; I remarked to him that we had called to see Mr. Tappan; he said that Mr. Tappen was not in, but that if our business was with the office, that he was interested with Mr. Tappan and would transact all business of the office; I then intro-
18 duced Mr. Beardsley to him; Mr. Beardsley remarked that he had called in a friendly manner to see if they would correct a report that was derogatory to the standing of his firm as merchants; Mr. Douglass replied to him that he would have no conversation with him in my presence on that subject; Mr. Beardsley said that I had come as a mutual friend and he did not see the impropriety of talking of the subject before me; he then said to him that he had nothing to say to him on the subject in my presence, and requested me to leave the office; he said again, when Mr. Beardsley urged him on the subject, that he would have nothing to say to him about it, and as he stood near me he touched my arm or shoulder and said, you will oblige me by leaving the office; I think there was nothing more said, but Mr. Douglass left us standing alone; we came away; there may have been some other conversation, but I don't recollect.

The counsel for the defendant objected in due season to the evidence of the above interview and conversation with Mr. Douglass as incompetent and inadmissible as evidence against the defendant, but the objection was overruled by his honor the judge, who ruled and decided that the said evidence was competent and admissible, to which ruling and decision the counsel for the defendant did then and there except.

Morris Birch, a witness for the plaintiffs, testified as follows:

The name of our firm is Dow & Birch; our business is "fancy goods;" we keep a variety of articles, the general term for which is "fancy goods;" our firm are subscribers to Mr. Tappan's agency; I called at the office in August or September, 1849; I can't be particular as to time; I saw a clerk and asked for a report of H. Beardsley & Co., of Norwalk, Ohio; the clerk went on and read from the book that J. Beardsley's wife had commenced or was commencing a suit for divorce and alimony, and if so, their store would be closed soon, and that the ability of the firm was not doubted so long as they were honest, and that would be as long as suited
their interest; I asked for the report of 1849, and that he said was
19 about the same thing; I asked for the report out of my own curiosity, from information I received from Mr. Calhoun; I will state the circumstance: I introduced Mr. Beardsley, in 1848, to the dry-goods house of Grant & Barton, and Mr. Calhoun, their clerk, gave me information which led me to ask for the report; it was in consequence of that statement that I went for the report as far as I can recollect; the report read to me stated nothing about their being sued; I was never there on any subsequent occasion.

Cross-examined:

Our firm subscribed for the first in July, 1849, and it was after that I went to Mr. Tappan's for the report; in making the inquiry I did not use a blank ticket, but wrote upon a piece of paper, (substantially the same as if I had a blank ticket.)

Charles C. Hatch, a witness for the plaintiffs, testified as follows:

The name of my firm is Hatch & Yale; our business is dry goods; I know the firm of Beardsley & Co., of Norwalk, Ohio; I first became acquainted with them in 1848 and 1849; I am unable to state the time; in 1848, at or before July, I believe, we were subscribers to the office of Mr. Tappan; I think it was in September, 1848, I heard this report; I, at that time, attended to the out-door business, and my partner, Mr. Yale, to the in-door business; I understood from Mr. Yale at that time that H. Beardsley & Co. had applied for credit; we did not credit them, because from all the information we could obtain from all sources, we were not satisfied to sell to them.

I did not receive any report of the firm from Mr. Tappan's agency; my partner did.

The counsel for the plaintiffs here proposed to read the depositions of certain persons examined in the State of Ohio, on the part of the plaintiffs, as witnesses in this action, under and by virtue of a commission or writ of dedimus potestatem issued in this action; to the reading of which depositions the counsel for the defendant did then and there object, on the ground that the said commission or writ, although issued out of the circuit court of the United States, in the name of the President
20 of the United States, was improperly tested in the name of the Hon. Samuel R. Betts, district judge of the United States for the southern district of New York, instead of being tested in the name of the Hon. Roger B. Taney, Chief Justice of the Supreme Court of the United States, and therefore was not tested in the manner prescribed and required by the act of Congress in such case made and provided; that by reason of such defect the commissioners in the said writ named had no legal power or authority to administer an oath to the witness examined before them, nor to take the depositions of said witnesses, and that the said depositions were, therefore, extra-judicial, and such as ought not to be read in evidence against the defendant, and for these reasons the said counsel did then and there pray the court to exclude the said depositions from being so read; to which it was answered by the counsel for the plaintiffs, that the defect in the test of the said writ was not material, and that the same under the provisions of the acts of Congress in such case made and provided might be disregarded or amended nunc pro tunc; and, also, that the defendant by interposing cross-interrogatories which, with the direct interrogatories on the plaintiffs' part, were annexed to the said writ had waived any objection to the form of the writ; and, also, that inasmuch as it appeared by the endorsement on the said commission and depositions that the same had been opened by the consent of the attorneys for the parties on the 28th day of October, 1851, more than four days before the commencement of the trial, it was now too late under the rules of the circuit court for the southern district of New York, to make the said objection, and his honor the judge sustained the said several answers of the plaintiffs' counsel, and thereupon overruled the said objection and denied the said prayer of the defendant counsel, and then and there ruled and decided that the said depositions might be read in evidence in the said action against the said defendant; to which said rulings and decision of the said judge, and to each and every part thereof, the counsel for the defendant did then and there except.

The counsel for the plaintiffs then read to the jury from the
21 deposition of Charles E. Newman, a witness examined under the aforesaid commission, the answers of said witness to the first direct interrogatory on the part of the plaintiffs, which interrogatory

related merely to name, &c., of the witness; and the said counsel then proposed to read in evidence the answer of said Newman to the second of said interrogatories, which interrogatory was in the following words:

"Was you in 1848 acquainted with the plaintiffs in this suit, and how long had you known them; were they members of any and what mercantile firm; what business did such firm transact; how many stores had they at the time, and where were they located; were they at the time doing a large or a small business, as compared in amount with other firms in Norwalk or Huron County?"

To the last two questions of which said interrogatory relating to the stores possessed, and the business done by the plaintiffs, the defendant's counsel objected (the interrogatories direct and cross, accompanying said commission, having been settled only provisionally, and with express reservation of all just exceptions) on the ground that said questions, and the matters therein inquired of, were wholly irrelevant to any matter in issue in the action, but the said objection was overruled by the court; and to the decision of the court overruling the same, the counsel for the defendant did then and there except.

The plaintiff's counsel then read from the said deposition the answer of said Newman to the said second interrogatory, which answer was in the words following, that is to say:

"In the year 1848 they had two stores in Norwalk, and were doing a large business."

The said second direct interrogatory, with the answers thereto, was also read in the progress of the trial by the plaintiffs' counsel, as a part of the depositions, respectively, of the several witnesses for the plaintiffs, examined in said commission, whose names are hereinafter mentioned, and on every such occasion the same objection, as hereinbefore mentioned was made by the defendant's counsel, and overruled by the court, and the decision of the court thereon excepted to by the counsel, as herein before stated.

22 The counsel for the plaintiffs also read from the deposition of Charles L. Boult, a witness examined on the part of the plaintiffs under said commission, a part of the answer of said witness to the eighteenth direct interrogatory on the part of the plaintiffs, which said interrogatory, by directions given therewith, the commissioners were instructed to put to the said Charles L. Boult, and which said 18th direct interrogatory was as follows:

"Where was you in the months of July and August, 1848; did you or not, at some time, in or about those months go to the office of the defendant, in the city of New York; if so, please state when was it, in whose company you went there, whom you met and conversed with there; and what was said there to and by the defendant, or his representatives in his office, respecting or affecting the plaintiffs' firm of H. Beardsley & Co.; please state all the particulars fully;" and which said answers to said questions were as follows:

To the 18th interrogatory, he saith:

"I was in the city of New York in the month of July, 1848; about the 25th of that month, I received in New York the letter of James Williams and Samuel T. Worcester, dated July 21, 1848, attached hereto, which letter enclosed the letter, a copy of the letter from W. A. Dibble, dated July 15, 1848, also attached hereto and now handed over to the commissioner; on the receipt of these letters, I called on Mr. W. A. Dibble and communicated to him the substance of the letter from Mr. Worcester and Mr. Williams, and perhaps exhibited it; I think I got from Mr. Dibble then, or while in New York, a statement of the names

of the creditors of H. Beardsley & Co., or some of them, and Mr. Dibble went with me to the office of the defendant; Mr. Tappan was not in; I was introduced by Mr. Dibble to the confidential clerk, as Mr. Dibble told me, of Mr. Tappan.

On making known our business to be to get information of the state of facts in relation to their report of the firm of H. Beardsley & Co., and correct an error in that report, the clerk informed us that Mr. Tappan was out; I think, while there, he read from a book a report, or what he stated to be their report of the commercial standing and credit of
23 the plaintiff's firm; I cannot now remember all that passed at that interview; I think we did not see the report ourselves, but only heard the clerk read from a book what he represented as the report to that agency, or the substance of them; I think he declined, when asked, telling who was the author of the report, or to show the origin, or allow a copy to be taken; and, as to the matter complained of, he said he would refer it to Mr. Tappan.

The report, as near as I now recollect it, is as follows:

That suits had been commenced against the plaintiffs; that they were putting their property out of their hands; that John Beardsley's wife was about filing a petition for a divorce and alimony against him; and I think it added that if she did it would probably wind him up. I told the clerk there was no danger of the failure of the firm of H. Beardsley & Co.; I think I stated the substance of the letter received from Messrs. Worcester & Williams, and he was informed that it was at the instance of the plaintiffs that I had called. I think the names of Dickinson & Churchill, Lee & Brewster, George Judson & Co., Furman & Davis, and Van Antwerp, Hubble & Co., were given me as firms who were of the creditors of plaintiffs, and I think I called at their places of business; those that I spoke to were aware of the reports against the credit of H. Beardsley & Co. I assured them that I thought there was no danger of a failure of that firm, and that the report, as far as it was designed to affect the credit of the plaintiffs, was unjust. I afterwards, and as I think within the next three or four days, called again at the office or agency of Mr. Tappan, in company with Mr. Lawrence, whose firm was then doing business upon the same street, and nearly opposite the store of Mr. Dibble. Mr. Lawrence introduced me to Mr. Tappan, the defendant, and I think the subject upon which I called was introduced, but the most of the conversation with Mr. Tappan was after Mr. Lawrence left; I sat and conversed with Mr. Tappan upon the subject of his report, and I stated that I had received the letter written at the instance of the plaintiffs by Messrs. Worcester & Williams. I think I had the letter
24 with me, but I am not certain that I read it to him, or whether I stated the substance of the letter verbally. I told him who Messrs. Worcester & Williams were, and what reliance could be placed upon their statements. Mr. Tappan then read me from a book what he represented as the report of the credit and standing of the plaintiffs to his agency. The report states that suits had been commenced against them; that they were putting their property out of their hands; that Mrs. John Beardsley was about to sue her husband for divorce and alimony, and that if she did it would probably wind them up, or it would wind them up. I also recollect the language, "They will probably fail," as a part of the report read the second time. When Mr. Tappan read this report I was sitting some little distance off; he did not show me the report as he read it, but held up that part of the corner of the book which was towards me, with the design, as I supposed, that I should not see it. I think I asked him if he would allow me to see the original report, or to tell me

who made it, and that he declined. I told Mr. Tappan that the report, as it affected the credit of the plaintiffs, was very unjust, and that I presumed they would not let it pass without taking measures for redress.

Mr. Tappan inquired very particularly about the circumstances and character of, and standing of the firm of John Beardsley in particular, and about the report as to his infidelity to his wife. I told Mr. Tappan, in the course of the conversation, that I had heard reports against Mr. John Beardsley to the effect that he was unchaste, and that I had also heard charges of dishonesty against him; that Mr. Beardsley had been embarrassed in his circumstances, and that the charges affecting his integrity were more spoken of while he was under embarrassment than latterly; that as to his family difficulty, I knew he did not live pleasantly with his wife, but that I did not know of any fact to justify the charge of want of chastity. I stated that I thought, and that others thought that Mrs. Beardsley was a monomaniac upon the subject of her jealousy of her husband, and that insanity had been in her family.

In the course of the conversation with Mr. Tappan, and after he
25 had heard what I had to say in answer to the questions he put to me, he turned to his report and stated that they sometimes got reports from other persons than their regular correspondents, and that they often carried abstracts of such information on their book in pencil. I got the impression from what he said that he wished me to understand that some parts of the report that bore the hardest on Messrs. Beardsleys' credit was in pencil; perhaps he stated so directly; I am not certain. Something was said about his modifying his abstract, and writing for further information; I have no knowledge what was done afterwards upon the subject, if anything.

Samuel E. Frink, a witness called out on the part of the plaintiffs, testified as follows:

My occupation is a dry-goods merchant in this city. I called at the office of Mr. Tappan for the report of Horace Beardsley & Co.; it was in the spring of 1850. I saw one of the clerks of the establishment; I asked him for a report of H. Beardsley & Co.; he opened the book and commenced reading, and then discontinued; he said he preferred Mr. Douglass should read the report. Mr. Douglass was called and read the report to me; the report was read by him from the books of the office—a book in the shape of a ledger. I remember the substance of what he read to me; it was that Mr. Beardsley had been sued; that Mr. John Beardsley was a man of not a good character; that he was not an honest man. He stated further that he thought the firm would pay their debts as long as it was their interest to do so, and no longer; he said that John Beardsley's wife either had or was about to commence a suit for divorce. I cannot state the date of the report; I don't know whether it was July or August, 1848.

The defendant's record being shown to witness, and witness having looked at the entries therein, said: I think that is the report Mr. Douglass read to me. I asked Mr. Douglass if the report was not doing injustice to Mr. Beardsley; I said to him that there were parties here who had sold Mr. Beardsley goods, and thought well of him, and were willing to sell him goods now to a reasonable amount; I suggested the idea of enquiring of those parties as to the truth of the report. Mr.
26 Douglass replied something like this: "What the report states is undoubtedly true, and I don't think it necessary to enquire of any one." The defendant's counsel objected in season to the evidence of this witness, as to the conversation between him and Mr. Douglass, as incom-

petent and inadmissible against the defendant; but the said objection was overruled by the court, to which said decision overruling said objection the counsel for the defendant did then and there except.

Cross-examined:

The name of my firm is Dibble, Frink & Co.; it was only Dibble & Frink at the time I got the report; our firm subscribed in the spring of 1850; the firm of Dibble & Frink was not in existence previously; in 1848 it was Odel & Frink; I think they were subscribers when I made the enquiry about Beardsley & Co. I must have handed in a ticket. I think Mr. John Beardsley was in the city at that time; my impression is that he was here buying goods, and that I had seen him; I went for the report at the request of Mr. Beardsley, but in regard to my own business. I think the ticket of enquiry which I gave was signed; I never made an enquiry without presenting a ticket signed by our firm. I have no doubt but all the matter on this book, (the record of the agency,) was the same read to me on that occasion; I don't see the words, "Mr. Beardsley was not a man of good character," here in this book; I recollect distinctly that those were the words used to me, and not my own inference—"not an honest man" were the precise words used. I did not see the book at that time; I never saw the inside of the book until within this quarter of an hour; I took no memorandum at the time, but trusted to my memory. I was probably ten minutes present with Mr. Douglass when he read this report; it might be fifteen minutes.

Washington Yale, a witness for the plaintiffs, testified as follows:

I am one of the firm of Hatch & Yale, dry-goods merchants. I know the firm of Horace Beardsley & Co.; I am personally acquainted with them. I went to the office of Mr. Tappan to enquire about the form of H. Beardsley & Co.; I can't say what time it was that I applied;
27 I have no memorandum; I believe it was after 1847. I saw one of the clerks with whom I had an interview; when I asked for the information of H. Beardsley & Co., the young man called for Mr. Douglass, who rather seemed to hesitate to read the statement; he said he had reports against the firm, but that he did not wish to read them until he had them confirmed; according to my best recollection, Mr. Douglass had a book or letter in his hand; I think he did not read from either of them; I think he referred verbally to Mr. Beardsly's having some difficulty with his wife. The defendant's record-book being shown to the witness, he says: I think what is on the book here is the substance of what was communicated to me at that time; in regard to "their store will be closed soon," I have no recollection of this clause being communicated; Mr. Beardsley was in town at that time; he had laid aside a few goods, perhaps $30 worth; I did not deliver those goods or any part of them; I may have delivered what he paid cash for, but I don't know whether I did or not; Mr. Hatch is my partner; we had sold them goods on credit before this, but our first dealings with them was for cash; we sold them to the amount of $128 28 in the spring of 1847, and took his note for it; it was about the 12th May, 1847.

The defendant's counsel objected in due season to the evidence of this witness, as to the conversation between him and Mr. Douglass, as incompetent and inadmissible against the defendant, but the said objection was overruled and the evidence decided to be admissible by the court, to which said decision so overruling said objection and admitting said evidence, the counsel for the defendant did then and there except.

Cross-examined:

I belong to the firm of Hatch & Yale; I don't remember when the firm subscribed to Mr. Tappan's agency; when I went to Mr. Tappan's office I went on our own business strictly; I don't remember the name or person of the clerk whom I saw at the office of Mr. Tappan; I presume I handed in a ticket, the usual one, with the name of H. Beardsley and Co. on it, and that it was signed by the name of our firm; I presume the printed blank used upon that occasion was the same as Exhibit No. 2.

The clerk said he preferred Mr. Douglass to read the information;
28 I think somebody else applied for the same information, and that some difficulty had already arisen which caused Mr. Douglass to wish to give the information himself; Mr. Douglass was called from the other end of the office; Mr. Douglass appeared more than usually reluctant; I think he stated and did not read the information to me; in declining to sell and deliver the fringes to Mr. Beardsley, I did not proceed entirely on the information received from Mr. Tappan's agency; it confirmed my mind not to sell.

The counsel for the plaintiffs here rested the case, on their part, reserving, at the consent of the court and of the defendant's counsel, the right to offer such other part of the depositions of witnesses examined under the plaintiff's commission, as they might be entitled to give in evidence.

The counsel for the defendant then renewed the objection of the variance between the words of the alleged libels as set out in the plaintiffs' declaration, and the words of the said alleged libels, as written and contained in the record-book of defendant, so as aforesaid given in evidence, and prayed the court to instruct and charge the jury, that the plaintiffs had failed to make out their said alleged cause of action, and that by reason of such variance between the said proof and the said declaration, the defendant was entitled to their verdict; which objection the said court overruled, and which charge and instruction the said court refused to give, to which said several decisions of the said court the counsel for the defendant did then and there except.

The counsel for the defendant having opened the case, on his part, to the jury, the following evidence was then produced and given on the part of the defendant.

William E. Lee, a witness for defendant, testified as follows:

I reside at Saratoga Springs; in 1848 I resided in New York; Lee, Judson & Lee was my firm; that firm was engaged in dry-goods business, jobbing; I know John Beardsley, I only knew him as the representative of the firm of H. Beardley & Co.; in 1848 I saw him
29 in the city of New York; cannot recall the exact time; I think we dealt with him; I think I saw him in the spring; I think I saw him in August or September, at the time the merchants made their purchases in New York; I had a conversation with Mr. Beardsley at that time; I cannot call to mind with any degree of distinctness what passed between him and myself, but I have impressions pretty vividly; in making inquiries at the office of Mr. Tappan concerning Mr. Beardsley's firm, I found he had been unfavorably reported, and I spoke to him on the subject; he never made any communication to me that he had put his property out of his hands; my impressions are that after enquiry at the office, and finding it reported that he was putting his property out of his hands I spoke to him of it; he denying any intention of putting his property out of his hands, so as to injure his bona fide creditors, and

he did not acknowledge having signed any papers at all, but my impressions are he said some papers had been prepared; that some attack had been meditated upon his property, and that he had some papers drawn up, to enable him to protect himself against some aggression, and that they never had been disclosed to any human being, and Mr. Tappan could not have known it; I don't think Beardsley told me what was the agression against which he was guarding his property; it was a delicate affair for me to speak about to him; I think he said expressly that those papers had not been executed; I think he said they were in his own possession; I don't remember any allusion to a divorce suit, except that I made a very careful allusion about the meditated agression; he was very guarded as to what he said about this agression; he intimated to me that there was some unjustifiable attack to be made upon him by which he was to be stripped of his property, and that these precautionary measures were taken to defend him against this piece of iniquity.

Cross-examined:

Before this our firm had sold goods to Mr. Beardsley on credit; don't remember when our dealings began with him. We were subscribers to Mr. Tappan's office; I think I enquired at the office, or got a report; I should think it was in course of the same week; Mr. Beardsley was, at that time, talking about buying goods; we considered him one of our customers: this was in the fall of 1848; I communicated to Mr. Beardsley that I had heard this report at Mr. Tappan's, or Mr. Beardsley spoke to me about it, if I did not speak to him first; I was endeavoring to reconcile these difficulties between them; I was trying to get the thing settled; Mr. Beardsley did not appear very angry about it; I believe Mr. Beardsley had not called upon Mr. Tappan at that time; I think it is very likely that I recommended him to call upon Mr. Tappan, as I said before, as I was anxious to see the matter settled; I was perfectly satisfied that Mr. Tappan had acted honestly in the matter, and that he reported only what he had heard; I was not regularly chosen as an internuncio between them; I had several conversations with Mr. Beardsley on this subject; I cannot tell when they occurred; all the conversations that were took place in my store in two or three consecutive days; I think that communications passed between us about his preparing to put his property out of his hands; he said it was not true; he stated that the only thing done was that some papers were drawn up, never executed and finally destroyed; I don't recollect that Beardsley said anything about a farm; I don't recollect that he said how long these papers were drawn; he did not say what papers they were; they were unexecuted papers; the way I understood the matter was that he expected an unjustifiable agression upon his property, but the thing had passed away, and the papers were destroyed; I understood it at that time to be a thing of very recent date; I think I made known to Mr. Tappan this denial of Mr. Beardsley.

The defendant's counsel then read the deposition of Philip R. Hopkins, a witness examined in the State of Ohio on the part of the defendant, under a commission issued on this action out of this court. The answer of said witness to [to] the first and second direct interrogatories on the part of the defendant, which interrogatories related to the names, &c., of the witnesses, and their knowledge of the parties, and also the answer of the said witness to the two following questions, being a part of the questions contained in the fifth of said direct interrogatories, that is to say:

"Was the plaintiff, John Beardsley, on or about the first day of

31 July, 1848, a married man? If so, was it not at the time generally reported in said town of Norwalk that his wife was about to file a bill of petition against him for a divorce and alimony, or either and which of them;" and which answer of said witness to said questions was as follows:

"John Beardsley, one of the firm of H. Beardsley & Co., was a married man at the date in said interrogatory named, to wit, July 1, 1848; I also heard it mentioned in Norwalk about that time that there existed a difficulty between said John Beardsley and his wife, and that she was about to file a bill for divorce."

The counsel for the plaintiffs then read the answer of said witness to the fourth cross-interrogatory, on the part of the plaintiffs, which cross-interrogatory was as follows:

"If you have testified that as early as the first day of July, 1848, or during the months of July or August, 1848, it was reported in the town of Norwalk that the wife of John Beardsley was about to file a bill or petition against him for a divorce and alimony, or either, please state, as precisely as possible, when, where, and from whom you heard such report; and specify distinctly whether it was before the first of July, or during July or during August in that year, when you first heard such report; and from whom, so far as you know, did it originate. Was any man, to your knowledge, (and if so, whom,) active in circulating such report? With what accuracy or certainty can you state the time of the first circulation of such report? How do you arrive at such accuracy or certainty?"

And which said answer thereto was as follows:

"That in the direct examination he stated that he had heard there was a difficulty between John Beardsley and wife, and that she was about to file a bill for a divorce, &c.; cannot name the precise time he first heard the report, nor can he state the person who first told of the difficulty, but thinks it was E. Andrews."

The defendant's counsel then read from the deposition of Timothy Baker, another witness for defendant, examined under the said commission, the answer of said witness to the said first and second direct interrogatories, and also his answer to the above-quoted part of the said fifth direct interrogatory, such answer being in the words following:

32 "John Beardsley was a married man; I knew his wife and daughter well; there was a difficulty between him and his wife for some years, and sometime in the early part of 1848 I heard frequently his wife intended to file a bill for divorce and alimony."

And the plaintiffs' counsel read the answer of the witness to the plaintiffs' fourth cross-interrogatory, above quoted, such answer being as follows:

"This question is answered by my fifth answer in chief."

The defendant's counsel then read from the deposition of Amos Parks, another witness for defendant, examined under the said commission, the answers of said witness to the said first and second direct interrogatories, and also his answer to the above-quoted part of the said fifth direct interrogatory, such answer being as follows:

"That John Beardsley was said to be a married man; it was generally reported that his wife was about to file a petition for divorce as early as the first of July, and I think before. I was so informed that she was about to file a petition for divorce."

And the plaintiffs' counsel read the answer of the witness to the plaintiffs' fourth cross-interrogatory above quoted, such answer being as follows:

"That it was in the early part of the season I first heard the report about Mrs. Beardsley filing a petition. It may have been the last of May or sometime in June, in Norwalk, at Daniel Watrous' shop, and of him. He was the first person who told me. I don't know where the report originated, but Daniel Watrous was the first man who told me. Don't know that any man was active in circulating such report."

The defendant's counsel then read from the deposition of John Gardiner, another witness for defendant, examined under the said commission, the answers of said witness to the said first and second direct interrogatories, and also his answer to the above-quoted part of the said fifth direct interrogatory, such answer being as follows:

"John Beardsley, one of the firm of H. Beardsley & Co., on or about the first day of July, 1848, was a married man, and it was reported
33 during the months of July and August, 1848, that Mrs. Beardsley, wife of said John Beardsley, had left her husband and house, and was about to file a bill or petition in the court of common pleas, in Huron County, for a divorce and alimony."

And the plaintiffs' counsel read the answer of the witness to the plaintiffs' fourth cross-interrogatory, above quoted, such answer being as follows:

"I was informed of Mrs. Beardsley's intention to file a bill, first in the office of the Branch Bank by one of the counsel she consulted, and I should say as early as July, 1848, and afterwards by Daniel Watrous, at whose house Mrs. Beardsley was staying."

The defendant's counsel then read from the deposition of John R. Osborn, another witness for defendant, examined under said commission, the answer of said witnesses to the said first and second direct interrogatories, and also his answer to the following questions, being a part of the questions contained in the fourth of said direct interrogatories:

"Was it or not generally reported in July, 1848, or about that time, at or in the vicinity of the said town of Norwalk, that the said firm of Beardsley & Co. had been or were sued? If yea, state whether or not it was then and there reported that such suits were commenced by or were under the charge of Judge Baker." And which answer of said witness to said questions was as follows:

"It was reported in the month of July, 1848, that Judge Baker had sued the firm of H. Beardsley & Co."

The plaintiffs' counsel then read the answer of the witness to the third cross-interrogatory on the part of the plaintiffs, which cross-interrogatory was as follows:

"If in answer to the fouth direct interrogatory you have testified that you knew, of your own knowledge, that the said firm of H. Beardsley & Co., or either of its members, were sued in or about the month of July and August, 1848, please state the amount as precisely as possible for which each suit was brought, not the nominal damages, but real amount expected to be recovered, and how you know this amount."

And which answer thereto was as follows:

"I never heard what the real amount in controversy was, other than appeared upon the face of the writs or summons."

34 Th plaintiffs' counsel then claimed the right to read the answer to other questions contained in the defendant's said fourth direct interrogatory, which said questions were as follows:

"Do you know whether or not the said firm of H. Beardsley & Co., or

any one or more of the members of the said firm, were sued in the said month of July and August, 1848, or in either of those months, or at or about either of those times? If yea, state your means of knowledge, and state also when, and by whom, and for what cause of action, and against whom in particular, and in what court or courts were the suits commenced; who were the attorneys in such suits, and who had the management or control of such suits respectively? Did any one commonly known by the appellation of Judge Baker commence any such suits, and if so, in what court, and when, and how many, and against whom in particular? Set forth all your knowledge in respect to the matters enquired of in this interrogatory."

And which said answer to said questions were as follows:

"My profession as an attorney attending upon the court of common pleas of Huron County enabled me to know that Judge Baker, either in his own name or in the firm name of 'J. W. Baker & Co.,' of which I suppose he was a member, had, prior to the June term, 1848, commenced two suits against the Beardsleys, one of them in case and the other in assumpsit; in one the damages were laid at $600; in the other, at $1,000. S. B. Stringer, according to my present recollection, was the attorney; before the commencement of these suits it was reported that John Beardsley, then in the city of New York, had caused an attachment to issue and to be levied upon the goods of Baker & Jennings, as they reached the city of Buffalo; pending this attachment, J. W. Baker consulted with me in relation to his interests in that matter; I knew that it was the intention of J. W. Baker and of Judge Baker to hold Messrs. Beardsley liable for the damages which they had sustained in this proceeding, and I believe these suits were instituted for this purpose; I do not now remember whether the commencement of these suits was, at the time of their being brought, a matter of public notoriety and report or not; the attachment, I remember distinctly, was very much talked of as soon as it was known, and I have no doubt that the proceedings by Judge Baker were equally the subject of public discussion; I do not know that Judge Baker commenced any other suits than those above referred to."

The defendant's counsel objected in season to so much of said questions and of the answers thereto as related to the witnesses knowledge of the suits referred to, or the commencement or nature or particulars of said suits, and insisted that evidence in respect to these matters, or to either of them, was irrelevant and inadmissible on the part of the plaintiffs, which said objections were overruled by the court and the whole of said answer [of said answer] of said witness to the said last mentioned questions, was permitted by the court to be read, and was read to the jury by the plaintiffs' counsel; to which said several decisions the defendant's counsel did then and there except.

The defendant's counsel then read from the deposition of Cortland L. Latimer, another witness for defendant examined under the said commission, the answers of said witness to said first and second direct interrogatories, and also his answers to the two questions above quoted, in connection with the testimony of John R. Osborn from the defendant's fourth direct interrogatory, and also to the further question contained in said fourth interrogatory as follows:

"In the month of August, 1848, or about that time, was it or not reported in said town of Norwalk, that two more suits, besides those commenced by Judge Baker, has been commenced against the said firm?"

And which said answer of said witness to the said questions was as follows:

"In 1848, deponent knew, and believes it to have been generally understood and reported, that H. Beardsley & Co., or John Beardsley, had been previously sued by Judge Baker and others; Mr. Horace Beardsley had not been long in Norwalk; Mr. John Beardsley was the trading partner, and when the matter was spoken of, it was to the effect that Beardsley was sued; deponent cannot state whether these suits were against H. Beardsley & Co. or against Mr. John Beardsley; as to reports in August, 1848, deponent cannot fix the date, but knows and
36 heard it talked of currently that other suits were pending against H. Beardsley & Co., or against Mr. John Beardsley; this was before September 25th, 1848."

The plaintiffs' counsel then read the answer of the witness Cortland L. Latimer to the same questions from the defendants' fourth direct interrogatory above quoted, and which said answer thereto was as follows:

"My means of knowledge are my presence in court as a lawyer at the calling of the dockets at the June and September terms of the court of common pleas, in which these suits were brought and pending; the conversation with members of the bar and others at the dates referred to, June and September and intermediate; deponent never examined the records or papers in any of said suits, and cannot state who were the attorneys, nor what was the cause of action, nor what the damages."

Deponent was never retained nor was ever interested in these suits as a lawyer, and can only state what he heard and saw incidentally."

William C. Hall, a witness for the defendant, testified as follows:

I am a member of the firm of William and John T. Hall, in 1848; Mr. David L. Moore was a clerk of ours in that year; I know Mr. John Beardsley, of the firm of Beardsley & Co., by sight; he was introduced to me by Mr. Moore; I think it was in 1848; he was at my office more than once, as often as twice, and perhaps three times; Mr. Beardsley never himself applied to us for goods; he was an acquaintance of Mr. Moore, and Mr. Moore shewed him our stock of goods; the first time he came into my store to my knowledge, Mr. Moore came to me and said Mr. Beardsley wanted to purchase goods on credit; no application was made on the part of Mr. Beardsley to purchase goods except through Mr. Moore; 20 hhds. of sugar and 35 or 40 half-chests of tea, amounting to $2,300 or $2,400, were laid out for sale to Mr. Beardsley; our firm were then subscribers to Mr. Tappan's office; I think I made application myself at that time at the office of Mr. Tappan respecting Beardsley & Co.; I have no recollection of ever sending Mr. Moore to Mr. Tappan's office for information; it was my usual practice to go myself. There were no articles selected; Mr. Beardsley merely wished to purchase a bill
37 of goods upon credit; this was made known to me by Mr. Moore; there was a decision not to sell to Mr. Beardsley; I made the decision after consultation with my brother; I don't remember that any quantity or amount was specified to me, or any particular articles; I did not act exclusively upon the information I received from Mr. Tappan's office.

Cross-examined:

The introduction of Mr. Beardsley to me by Mr. Moore, I believe to be in the sping or summer of 1848; he was looking at goods, groceries,

teas, coffees, &c.; I don't know that Mr. Beardsley ever looked at 20 hhds. of sugar and 35 or 40 half-chests of "Young Hyson" tea. It would not be the duty of Mr. Moore to make enquiries at Mr. Tappan's agency; I never commissioned Mr. Moore to go to Mr. Tappan's agency for informalion; Mr. Moore told me that Mr. Beardsley bought largely in the market; I could not say that Mr. Moore told me the amount; according to my best recollection no amount was named. It was in consequence of Mr. Beardsley wishing to purchase a large bill of goods that I went to Mr. Tappan; the application I made was in writing; I cannot tell who gave me the report, it was probably given by one of the clerks; I think he read it from a ledger.

The record-book was shown to witness by plaintiffs' counsel, who requested him to refresh his memory by looking at it. Witness: I think the report I got was the same in substance as in this book; I declined selling Mr. Beardsley after I got this report from Mr. Tappan. If the report at Mr. Tappan's had confirmed Mr. Moore's statement, I think we should have sold Mr. Beardsley a reasonable amount.

On his further direct-examination the witness said:

If the books of Mr. Tappan had been silent, and had contained no report of Mr. Beardsley, I would not have sold him goods.

Samuel M. Beckley, a witness for defendant, testified as follows:

I am a merchant residing in this city; my present firm is Kent, Clapp & Beckley; we are engaged in the dry-goods business—selling both to city and country merchants; we sell to traders residing in per-
38 haps two-thirds of the States of the Union; with my present house I have been connected since January last, but I have been in the same business many years; from 1834 to 1845 I was connected with the house of D. A. Cushman & Co., which house did a very large business in dry goods selling on credit to merchants in various parts of the United States.

The plaintiffs' counsel here inquired of the defendant's counsel what was proposed to be proved by this witness; whereupon the defendant's counsel stated that they proposed to prove by this witness, and by other witnesses who had been long engaged in, and who were familiarly acquainted with, the internal trade and commerce of the city of New York, that of the goods and merchandize sold in said city to merchants and traders residing in the interior of the country, the greater part heretofore had been and still was, according to the usual course of trade, sold to such country merchants and traders upon credit; that they, the said witnesses, were personally and familiarly acquainted with the nature, necessities, and interests of such trade, and with the plan, operation, and effect of mercantile agencies like that established and conducted by the defendant; and that, in the opinion and judgment of said witnesses, the said mercantile agencies were useful, advantageous, and necessary to the convenient and successful conduct of said internal trade and commerce; to which proposed evidence the counsel for the plaintiffs then and there objected, and his honor the judge overruled the same, on the ground that no evidence had been given on the part of the plaintiffs tending to impeach or to bring into doubt the general legality or usefulness of the business or agency established and conducted by defendant; that the only question before the court was as to the manner in which the defendant had conducted his said business in reference to the plaintiffs in the matters complained of by them; and that the proposed evidence was

therefore unnecessary and irrelevant; to which decision and ruling of the said judge the counsel for the defendant then and there excepted.

The witness being cross-examined by the plaintiffs' counsel, said:

39 In 1848 I was not a subscriber to Mr. Tappan's agency; in 1849 I became a subscriber to his agency and have been so since, but I have no recollection of having asked for a report as to H. Beardsley & Co.

Re-direct:

Before 1849 I was a subscriber to the mercantile agency of Woodward & Dusenberry, in this city.

The defendant's counsel then introduced and gave in evidence the subscriptions, respectively, of Hatch & Yale, dated February 17th, 1847; of William and John T. Hall, dated September 18th, 1846; of Samuel E. Frink, dated February 27th, 1849; of Dow & Birch, dated 1st November, 1849, and of Dibble & Frink, dated March 14th, 1850; all of which were in substantially the same form as the subscription of S. and T. Lawrence, marked No. 1, and hereinbefore set forth, except that the last two subscriptions, (those of Dow & Birch, and Dibble & Frink,) were headed as follows: "Terms of subscription to the Mercantile Agency of Tappan & Douglass, established in the city of New York, by Lewis Tappan, June 1841," and except, also, that the contract to pay, &c., on the part of the said last-mentioned subscribers, was with Tappan & Douglass.

The counsel for defendant here rested the case upon his part.

The plaintiffs' counsel then read as evidence on the part of the plaintiffs, from the deposition of Ebenezer Andrews, a witness examined on the part of the defendant, under his aforesaid commission, the answers of said Ebenezer Andrews to the first, second, third, fourth, and fifth of defendant's direct interrogatories, which answers were as follows:

To the first interrogatory: "My name is Ebenezer Andrews; my age about 55 years; by occupation an attorney and counsellor-at-law; I reside in Milan, Erie County, Ohio."

To the second interrogatory he answers: "I have been acquainted with John Beardsley for several years past; my knowledge of the other two is very limited; I know them personally."

To the third interrogatory: "I believe there was a firm doing

40 business in Norwalk, in 1848, under the name of H. Beardsley & Co. The firm was compared, I believe, of John Beardsley, and his brother H. Beardsley; I do not know whether other persons belonged to the firm or not; the firm were engaged in the sale of dry goods and groceries; such goods as are usually kept in country stores."

To the fourth interrogatory: "I know nothing in relation to the matters therein contained."

To the fifth interrogatory: "John Beardsley was, on the 1st of July, 1848, a married man; as to any reports about his wife filing a bill, or being about to file a bill, for divorce, I know nothing; living four miles distant from Norwalk, I should not be very likely to hear such report; I do know that a bill for divorce was filed in the court of common pleas of Huron County, Ohio, by Mrs. Beardsley or in her name, against her husband John Beardsley, and was pending in that court during several terms, but I believe no hearing was ever had in the case; I cannot state at what time the petition was filed."

The plaintiffs' counsel then read from the deposition of Daniel Watrous, a witness for the plaintiffs, examined on their part, under their aforesaid commission, the answer of the said Watrous to the plaintiffs' fourth direct interrogatory, which said fourth direct interrogatory was in the following words:

"Did you hear or know at any time during the months of June, July or August, 1848, that there was a report or rumour being circulated in Norwalk, to the effect that the wife of the plaintiff, John Beardsley, was about to file a bill or petition for divorce and alimony? If such a report had been or was at that time in circulation, would you or not have heard it? Were you absent from Norwalk, or your place of residence, any, and, if so, what portion of time during the said months of June, July, and August, 1848?

"When did you first hear it reported in Norwalk that Mrs. Beardsley, the wife of the plaintiff, John Beardsley, was about to file a bill for divorce and alimony? Did you hear at any time, and, if so, when, that such a report had been circulated in New York? When you first heard such a report at Norwalk, was it before or after you heard that
41 such a report had been circulated in New York? When did you first hear that Mrs. Beardsley had actually commenced a suit against the plaintiff, John Beardsley, for divorce and alimony?

And which said answer of said witness was as follows:

"I never heard that Mrs. Beardsley intended or was about to file a bill for divorce and alimony until some time in September, 1848, and then I heard that such a report had been circulated by the defendant in New York; no such report was circulated in Norwalk to my knowledge; the first I knew of the matter, except as above, was that such a bill had been filed, and then I could hardly believe it was true; Mrs. Beardsley is a sister to my wife, and during the month of July and August, 1848, was an inmate of my family, and I cannot believe that any such report could have been circulated in Norwalk without my hearing of it."

The counsel for the defendant objected in due season to the whole of the said fourth interrogatory as improper and irrelevant, and said counsel particularly objected to the two questions in said interrogatory, as to hearing that reports had been circulated in New York, as wholly irrelevant and inadmissible, and also to the last question in said interrogatory, as to the hearing of the actual commencement of a suit by Mrs. Beardsley, on the ground that, as the defendant had given no proof of the actual commencement of any such suit, the plaintiffs had no right to offer evidence touching the same; each of which said several objections was overruled by the court, his honor the judge deciding that the whole interrogatory, and each of the several questions particularly objected to, were relevant and proper, to each of which said several decisions the defendant's counsel did then and there except.

The defendant's counsel also objected in due season to the whole of the answer of the said Daniel Watrous to the said fourth direct interrogatory as incompetent and inadmissible as evidence against the defendant, and particularly to the parts of the said answer relating to reports in New York, and referring to Mrs. Beardsley's actual commencement of a suit for divorce and alimony.

42 Each of said several objections was overruled by the court, his honor the judge deciding that the whole of said answer was competent and admissible evidence, to each of which said several decisions the defendant's counsel then and there excepted.

The plaintiffs' counsel afterwards read the answer of Charles E. Newman and Charles L. Boult, and also of each of the other witnesses examined for the plaintiffs under their said commission, and whose names are hereinafter mentioned to the said fourth direct interrogatory, on the occasion of the reading thereof, respectively, the above stated objections to the whole of said interrogatories, and to the

particular questions above specified, were renewed by defendant's counsel, and the like decisions as above stated were made by the court, and to said decisions, respectively, the defendant's counsel then and there excepted.

The plaintiffs' counsel then read in evidence on their part from the deposition of said Daniel Watrous the answer of said witness to the defendant's seventeeth cross-interrogatory accompany said commission, which said seventeenth cross-interrogatory was as follows:

"Did you ever have any conversation with any person respecting the fact or the report that Mrs. Beardsley had filed or was about to file a bill or petition for divorce and alimony, or had commenced or was about to commence proceedings of any description for such divorce; if yea, state when and how often you had such conversations, with whom, for what purpose, and to what effect.

"State how you first heard, and when, and from whom, that any such bill, petition, or proceedings were in contemplation, or had been filed or commenced; where were you when you first heard of any report on this subject, and from whom did you first hear or learn of such report."

And which answer thereto was as follows:

"I never knew that Mrs. Beardsley intended to file a bill for divorce and alimony until after the bill was filed, except that I heard it was so reported by the defendant in New York City; when I first heard that such a bill had been filed, I was in Norwalk, near the plaintiffs' store; John Beardsley then handed me a copy of the summons."

43 The defendant's counsel objected in due season to the whole of said interrogatory as improper and incompetent to be put on the part of the plaintiffs, in which light said counsel insisted the said interrogatory, if read by the plaintiffs' counsel, should be regarded; and said counsel also particularly objected to the first two questions concerning conversations had by witness as improper and irrelevant and inadmissible, each of which said several objections was overruled by the court, and the whole of said interrogatory, and each of the several questions therein, was decided by the court to be relevant, proper, and admissible, to which said several decisions the defendant's counsel then and there excepted.

The defendant's counsel also objected in due season to the whole of the answer of said Watrous to the said seventeenth cross-interrogatory, and particularly to his answers to the questions above specified as incompetent and inadmissible as evidence against the defendant, which said several objections were overruled by the court, his honor the judge deciding that the whole of said answer was competent and admissible evidence, to which said several decisions the defendant's counsel then and there excepted.

The plaintiffs' counsel afterwards read the answer of Charles E. Newman and Charles L. Boult, and also of each of the other witnesses examined for the plaintiffs under their said commission, and whose names are hereinafter mentioned, to the said seventeenth cross-interrogatory, on which occasions, respectively, the like objections were made by defendant's counsel to the said interrogatory, and to the answers thereto. The like decisions overruling said objections were made by the court and the like objections to said several decisions then and there taken by the defendant's counsel.

The plaintiffs' counsel then read from the deposition of Charles E. Newman, hereinbefore named, the answer of said Newman to the plaintiff's seventh direct interrogatory, which said interrogatory, as read by said counsel, was as follows:

"Did you hear or know in the month of June, July, or August, 1846, that Judge Baker had sued the plaintiff, John Beardsley, individually, and firm of H. Beardsley & Co.; and, if aye, when did you first hear of it?

44 "Did you at any time during the said months know or hear that any other suit had been commenced against the said firm of H. Beardsley & Co., besides those commenced by Judge Baker? If aye, when did you first hear that said suits had been commenced?

"How did the commencement or prosecution of said several suits effect the credit or standing at Norwalk of the said firm of H. Beardsley & Co.; did it, so far as you know or believe, create any doubt as to the solvency of the said firm of H. Beardsley & Co., or in any manner injure the mercantile credit and standing of the said firm?"

And which said answer thereto was as follows:

"I did not hear or know of any suits being commenced against the firm or either of the plaintiffs in the month of June or July, 1848; but in the fall may have heard of Judge Baker and J. W. Baker having commenced a suit, but have no distinct recollection of it."

The defendant's counsel objected in due season to the last two questions in said interrogatory, on the ground that the influence or effect of the commencement or prosecution of the suits therein referred to at Norwalk was not relevant to the matters in issue, and that the belief or opinion of the witness on the subject inquired of was incompetent and inadmissible as evidence against the defendant; which said several objections were overruled by the court; to which said several decisions overruling said objections, the defendant's counsel then and there excepted.

The defendant's counsel also objected on the same grounds to the reading of the answers of the said Newman to said two questions, which objections were overruled by the court, and the said answers allowed to be read; to which said several decisions the defendant's counsel then and there excepted.

The plaintiffs' counsel afterwards read the answers of Daniel Watrous and Charles L. Boult, and also of each of the several witnesses hereafter named to said plaintiffs' seventh direct interrogatory, on which occasions, respectively, the like objections were made by defendant's counsel to said interrogatory and to the answers thereto, as above stated; the like decisions overruling said objections were made by the court, and the like exceptions to said several decisions then and there taken by defendant's counsel.

45 The plaintiffs' counsel then read the answer of said Charles E. Newman to the plaintiffs' eighth direct interrogatory, which interrogatory was as follows:

"Was it reported in Norwalk aforesaid, at any time during the months of June, July, or August, 1848, or at any time during the year 1848, that the plaintiff, John Beardsley, was putting his property out of his hands, or that he was putting his real estate out of his hands, or that the store or stores of the plaintiffs, H. Beardsley & Co., would be closed soon, or anything to that effect? Could such a report have been in circulation without you having heard it?"

And which answer thereto was as follows:

"I never heard any report in June, July, or August, 1848, or at any time before or since, that John or Horace Beardsley were putting their property, personal or real, out of their hands. If there had been any such report, I should certainly have heard it."

The defendant's counsel objected in due season to the whole of said

interrogatory as incompetent and inadmissible on the part of the plaintiffs, especially as the defendant had offered no proof of any such report in Norwalk as was inquired of in said interrogatory. The objection was overruled by the court, and the interrogatory held to be competent and admissible, to which said several decisions the defendant's counsel then and there excepted.

The defendant's counsel also objected on the same grounds to the reading of the answer of said Newman to said interrogatory, which objection was overruled by the court, and the answer allowed to be read, to which said several decisions the defendant's counsel then and there excepted.

The plaintiffs' counsel afterwards read the answers of Daniel Watrous and Charles L. Boult, and of each of the witnesses hereinafter named, to said plaintiffs' eighth direct interrogatory, on which occasions, respecting, the like objections were made by defendant's counsel to said interrogatory and to the answers thereto; as above stated, the like decisions overruling said objections were made by the court, and the like exceptions to said several decisions were then and there made by the defendant's counsel.

46 The answer of Samuel T. Worcester, one of the plaintiffs' witness, examined under the said commission, whose deposition was read by the plaintiffs' counsel, to the plaintiffs' above-quoted fourth direct interrogatory was as follows:

"The first that I ever heard that any such report existed, either in Norwalk or elsewhere, was, I think, about the 21st of July, 1848, and I first heard that report through a letter then read to me by Mr. John Beardsly, which was received by him, as he said, and which purported to come from William A. Dibble, whom I understood to be a merchant doing business in New York City, and a correspondent of H. Beardsley & Co.; this letter from W. A. Dibble was dated July 15th, 1848; the original letter of Mr. Dibble above refered to is appended to the deposition of Charles L. Boult, taken in this case, who had been previously engaged with me as a [a] partner in the practice of the law at Norwalk; at the request of Mr. Beardsley I enclosed the letter of Mr. Dibble in another letter written by me and signed by James Williams and myself, directed to Mr. Charles L. Boult, in New York, which original letter, written by me as above stated, has been shown to me in the course of this examination, and is also appended to the deposition of said Boult; if such a report had been common in the village prior to the time I heard of it as above, I should have probably known it; I do not recollect of being absent from Norwalk more than two or three days at a time during the summer of 1848; my office of business was centrally situated in the village of Norwalk, directly opposite the court-house, and I was there daily except when absent from town.

"The suit of Mrs. Beardsley for divorce was commenced on the 5th of December, 1848, as I think. I heard of it sometime after, when at Columbus, where I was at that time, and where I spent the winter."

To the reading of that part of which said answer, in which the witness spoke of the letter, and the contents thereof, of William A. Dibble to the witness, the defendant's counsel objected as incompetent and inadmissible as evidence against defendant, which objection was overruled by the court, to which ruling and decisions the defendant's counsel then and there excepted.

47 The answer of James M. Farr, one of the plaintiffs' witnesses, examined under their said commission, whose deposition was read

by the plaintiffs' counsel, to the plaintiffs' above-quoted seventh direct interrogatory was as follows:

"Sometime during the summer of 1848 heard that Timothy Baker commenced suit against H. Beardsley & Co., but supposed this at the time to be a sort of retaliatory measure, as just previous to that time I understood said firm of H. Beardsley & Co. had obtained a judgment to a large amount against said Judge Baker or his son, or both together. So far as I am aware, this thing was understood by the public as I understood it; and the commencement of said suits had no effect whatever to impair the credit of said firm."

To the reading of that part of which said answer the defendant's counsel objected as uncalled for, irrelevant, and inadmissible as evidence against the defendant, which objection was overruled by the court, to which ruling and decision the defendant's counsel then and there excepted.

The counsel for said plantiffs then read from the deposition of said Charles E. Newman the answers of said witness to the defendant's fourth, seventh, eleventh, twelfth, and fifteenth cross-interrogatories, which said several interrogatories were as follows:

"4th. What within and to your actual knowledge was Horace Beardsley worth when he entered into partnership with John Beardsley? How had he acquired his capital, if any he had? What within and to your actual knowledge was John Beardsley worth at that time, and how had he acquired his capital, if any he had? Had he not been a lawyer at some period of his life; and, if so, when and how long a time? Did you ever hear of his being eminent, or successful, or fortunate as a lawyer? Was his business as a lawyer ever more than would enable him to support a family?

"7th. When did said John Beardsley first come to Norwalk?
48 Was he not then embarrassed and unable to pay his debts? Was it not generally reported of him that such was the case? Were there or not judgments numerous or otherwise against him? Did he not make a compromise with his creditors? If yea, when? Do you know, or have you heard, whether any, and if any, what representations were made by him with regard to his ability to pay his debts at that time to induce his creditors to conclude such compromise? Did he not represent himself as totally unable to pay his debts? Was such representation true? If yea, how do you know it was true, or what reason had you for supposing it to be true?

"11th. Do you know anything of your own knowledge as to the extent of plaintiffs' business in 1848, as compared with other firms in Norwalk or Huron County? Did you ever examine their books? Can you remember distinctly about the credit or standing of the plaintiffs in the months of July and August, 1848, as distinguished from any other season? If yea, what circumstances or facts enable you to do so? Declare the truth fully and at large.

"12th. Was not John Beardsley absent from Norwalk in the fall of 1847 or winter of 1847, and in the spring of 1848, an unusual length of time, and for what cause? What effect did this circumstance have on the standing and credit of the firm of Beardsley & Co. in the spring and summer of 1848, and was not the credit of said firm impaired? Was it not known or generally reported that they had purchased an unusually large stock of goods in the fall of 1847 or winter of 1847–1848, especially groceries; and was it not generally believed and generally reported that their business was too largely extended?

"15th. Did John Beardsley keep house in Norwalk? What was his

state of living? Were you ever in his house? Do you not know, and did you not hear, and was it not generally understood in Norwalk, in the spring, summer, or fall of 1848, that said John Beardsley was disposing of his household furniture, carpets, &c.; if yea, for what purpose or cause was it reported that he was so doing? Do you know, or did you hear anything, or was anything reported with regard to
49 said John Beardsley conveying away, or in any way disposing of, any real estate in the spring or summer of 1848; if yea, state fully and particularly all such your knowledge, or such general report upon the subject?"

And which several answers to said interrogatories were as follows:

To 4th cross-interrogatory: "Cannot say that I know what Horace or John Beardsley were worth when they went into the mercantile business; they were reputed to have a firm mercantile capital; cannot say how they acquired this capital."

To the 7th cross-interrogatory: "Can't say when John Beardsley came to Norwalk; it was before my acquaintance with him; and to all other questions in the 7th cross-interrogatory, I know nothing, and therefore cannot answer."

To the 11th cross-interrogatory: "The plaintiffs were doing a large business, in comparison to other firms in Norwalk in 1848; never examined their books, but do remember distinctly about their credit and standing in the months of July and August, 1848; they were doing at that time a sure and successful business, and no one, as far as I know, entertained or expressed any doubt of their ability to meet their business engagements; no merchants in the county stood higher in public estimation than the plaintiffs."

To the 12th cross-interrogatory: "Cannot say that John Beardsley was absent in the spring, or summer, or fall of 1847, or in the winter or spring of 1848, an unusual length of time; the credit of the firm was not impaired in the spring and summer of 1848, nor was it reported or believed that their business was too largely extended."

To the 15th cross-interrogatory: "John Beardsley kept house in Norwalk for several years prior to 1848; did not hear it reported that he was disposing of his household furniture, or that he was conveying away in any manner his personal or real estate."
50

The defendant's counsel objected in season to the reading of said fourth, seventh, eleventh, twelfth, and fifteenth cross-interrogatories, and to each of them, as not competent or admissible to be put by the plaintiffs, and also to the reading of the answers thereto, and each of them, as not competent or admissible as evidence on the part of the plaintiffs, each of which said several objections were overruled by the court, to each of which decisions overruling the said several objections the defendant's counsel then and there excepted.

The plaintiffs' counsel afterwards read from the depositions of Daniel Watrous and Charles E. Boult, hereinbefore named, and also from the depositions of John F. Dewey, William H. Atkinson, James M. Farr, Horace R. Jerome, Alfred G. Sutton, Charles B. Stickney, T. R. Strong, G. Morehouse, Pruding Alling, David Johnson, Samuel F. Worcester, David F. Barnum, Thomas Raitt, Daniel G. Raitt, Peter B. Hoyt, David Mallory, Theodore W. Means, William R. Hoyt, Lester Clarke, Joseph W. Erckhart, A. J. Derwalt, C. J. Brown, W. Wygatt, Oscar E. Kellogg, Gyles Slocum, John Whyler, M. R. Burnsley, John Beebe, Henry Brown, James Williams, Eyra M. Stone, witnesses for the plaintiff, examined under their said commission, the answers of the said several witness to the defendant's said fourth, seventh, eleventh, twelfth, and

fifteenth cross-interrogatories, on each of which occasions the like objections as above were made by the defendant's counsel to the said several interrogatories, and the answers thereto, and the like decisions on the said ocjections, were made by the court, and the like exceptions to such decisions respectively were taken by said counsel.

The counsel for the plaintiffs then read from the deposition of said Charles E. Newman his answer to two questions in the defendant's twenty-first cross-interrogatory, which said questions were as follows:

21. Was not his general reputation, so far as promptness in pay-
51 ing his debts and meeting his engagements concerned, bad? If not, what was it? Declare the truth herein.

And which said answer thereto was as follows:

"His reputation for promptness in meeting his engagements was good."

The defendant's counsel objected in season to the reading of said two questions as not competent or admissible to be put to the plaintiff, and also to the reading of the answers thereto as not competent or admissible as evidence on the part of the plaintiffs, each of which said objections was overruled by the court, to each of which decisions overruling said several objections the defendant's counsel then and there excepted.

The plaintiffs' counsel afterwards read from the depositions of said Daniel Watrous and Charles E. Boult, and also from the depositions of each of the other witnesses for the plaintiffs, examined under their said commission, whose names are hereinbefore mentioned, the answers of the said several witnesses to the said two questions in defendant's said 21st interrogatory, on each of which occasions the like objections as above were made by defendant's counsel, the like decisions by the court, and the like exceptions to such decisions, respectively, were taken by said counsel.

The plaintiffs' counsel then read from the deposition of John F. Dewey, a witness examined under said plaintiffs' commission, the answer of said witness to the plaintiffs' tenth direct interrogatory, which interrogatory was as follows:

10th. In July, 1848, at Newark, what was the plaintiffs' firm of H. Beardsley & Co. reputed to be worth, and what were the plaintiffs reputed to be worth individually? State all you know relative to the amount and value of property, real and personal, belonging to the said firm of H. Beardsley & Co., and to the plaintiffs individually.

And which said answer thereto was as follows: "They were reputed to have a good mercantile capital."

(The defendant's counsel objected in season to the said inter-
52 rogatory and the answer thereto as irrelevant and inadmissible; but said objections were overruled by the court, and to the decision overruling the same, the counsel for the defendants then and there excepted.)

The plaintiffs' counsel afterwards read from the deposition of Samuel T. Worcester, James Williams, Charles L. Boult, James M. Farr, Oscar E. Kellogg, Giles Slocum, William H. Atkinson, William R. Hoyt, Henry Brown, and Theodore Williams, witnesses examined for the plaintiffs under their said commission, the answers of said several witnesses to the said 10th direct interrogatory, on each of which occasions the like objections as above to said interrogatory, and to the answers thereto, were made by the defendant's counsel; the like decisions were made by the court, and the like exceptions were taken by the defendant's counsel.

The answers of this witness, John F. Dewey, to the defendant's 4th and 11th cross-interrogatories above quoted, were as follows:

Answer to defendant's 4th cross-interrogatory: "I have no means of knowing what Horace Beardsley was worth; nor can't state precisely what John Beardsley was worth, and only stated what his visible means were. I always understood and believed that he had ample cash capital to carry on the mercantile business, beside the real estate heretofore mentioned; nor do I know how either of them acquired capital, as my acquaintance did not commence until about the time they went into the mercantile business."

Answer to 11th cross-interrogatory: "I think the plaintiffs were doing the most business of any mercantile house in Nowalk, or in the county. I think the credit of H. Beardsley & Co. in the summer and fall of 1848 was good. Sometime in the fall of 1848 I heard that defendant had circulated a report in the city of New York reflecting upon the character and standing of the firm; I think I heard this in the summer or latter part of the fall of 1848. At the time I heard the report circulated, my attention was particularly directed to the character and standing
53 of the plaintiffs; it was a matter of surprise to me then, and, so far as I heard an expression upon the subject, to others, that such a report should have been put in circulation."

Answer to part of 21st cross-interrogatory: "I considered his reputation for promptness in paying his debts good; I [I] should have no hesitation in lending him money; never heard his promptness in this respect questioned."

The defendant's counsel objected in season to so much of the said answer to said 4th cross-interrogatory as follows:

"I always understood and believed that he had ample cash capital to carry on the mercantile business besides his real estate heretefore mentioned."

And to so much of the said answer to said 11th cross-interrogatory as follows:

"Sometime in the year 1848, I heard that the defendant had circulated a report in the city of New York, reflecting upon the character and standing of the firm; I think I heard this the latter part of the summer or early part of the fall of 1848, and, at the time I heard this report was circulated, my attention was particularly directed to the character and standing of the plaintiffs; it was a matter of surprise to me then, and, so far as I heard an expression upon the subject, to others, that such a report should have been put in circulation."

And to so much of said answer to said two questions from said 21st cross-interrogatory as follows:

"I considered his reputation for promptness in paying his debts good; should have no hesitation in lending him money; never heard his promptness in this respect questioned:" on the grounds that the parts of said answers so objected to were not called for by his interrogatories, and that the matters therein stated were not relevant to the case, nor admissible as evidence against the defendants; but the said several objections were overruled by the court, and the said several parts of said answers so objected to were allowed by the court to be read as evidence, to which said several rulings and decisions the defendant's counsel then and there excepted.

54 The counsel for the plaintiffs then read the answer of Charles B. Stickney, one of their aforesaid witnesses, to the plaintiffs' 14th direct interrogatory, which said interrogatory was as follows:

14th. Were you present in court when the first divorce suit of Mrs. Beardsley was called for trial? If so, state what occurred at that time. Did Mrs. Beardsley, or her attorney, attempt to get the cause continued?

was the motion opposed, and by whom, and in whose behalf? what cause, or causes, if any, did he urge as the ground of such motion? did he or not claim that certain material witnesses named in his subpœna could not be found, and had not been served with process? were not the said witnesses whom the attorney of Mrs. Beardsley said were absent, found to be present in attendance in the court? were or not all the witnesses named in the subpœna of Mrs. Beardsley, and all the witnesses whom her attorney claimed to be material in his argument to the court, found to be in court? was or not the attorney of Mrs. Beardsley informed by any person that all his witnesses were in court? and if so, by whom? and had any one, and if so, who, taken pains to insure their attendance? did the court allow, or refuse to allow the said motion to continue said cause? when the court refused to continue said cause, what course did Mrs. Beardsley's attorney then take in the cause? did he examine or call a witness? what reason, if any, did he assign to you, or in your hearing, for discontinuing the cause? did he then make any and what threats about commencing another suit? did he commence another suit, and when? were you present when the second divorce suit of Mrs. Beardsley was called on for trial? when was it? at what term of the court? what took place at that trial? did the attorney for Mrs. Beardsley make an effort to get the case continued? was the motion opposed, and by whom, and in whose behalf? what cause or causes were assigned in support of such motion? did the court grant or refuse such motion? was any witness sworn or examined in behalf of Mr. Beardsley? was any, and if so, what, attempt made by Mrs. Beardsley, or by her attorney on her behalf, to prove that any of the charges contained in her said bill were true? how did the suit result, and was not a final decree rendered at
55 that term of the court?

And which said answer thereto were as follows:

"I was in court at the time mentioned, but have not a very distinct recollection of all that past; when the suit of Mrs. Beardsley was called for hearing, S. F. Taylor, the attorney for Mrs. Beardsley, moved a continuance of the cause on the ground that some of his material witnesses were not in attendance, and could not be found; the motion was opposed by John Beardsley, and then he stated to the court, as also to Mr. Taylor, that all the witnesses named in their subpœna, and particularly those whom Mr. Taylor said were absent, were then in court; that said Beardsley said he had good reason to believe said suit was not intended to be brought to a hearing, and that at his own expense and trouble he had procured the attendance of all Mrs. Beardsley's witnesses, to prevent a continuance of said suit."

"The court then overruled motion for continuance, and said if Mr. Taylor had no other reason for continuance, he must proceed to a hearing; whereupon Mr. Taylor abandoned the suit, and it was ordered by the court to be discontinued."

The defendant's counsel objected in season to the reading of said 14th direct interrogatory, on the ground that the transactions and things therein inquired of were wholly irrelevant and inadmissible; that they were not within the issue formed by the pleadings, nor within any matter contained in the alleged libels, nor in the notice of defendant accompanying his plea, or authorized to be given as rebutting testimony, or admissible in evidence against the defendant in this action, and also on the further ground that the only legal and competent evidence of any proceedings in the said court of common pleas, in the case inquired of by

the said interrogatory, was the record or the written minutes duly verified and proved, and the said counsel also objected to the reading of the said answer to the said interrogatory as evidence against the defendant on all the said grounds; but the said several objections were then and there overruled by the court, and the said answer to said interrogatory was allowed to be read in evidence, to which said several
56 rulings and decisions the counsel for the defendant then and there excepted.

The plaintiffs' counsel then produced and offered in evidence a record, duly certified, of the second suit for divorce, commenced against the plaintiff, John Beardsley, by the wife of the said John Beardsley, in the said 14th direct interrogatory, and in the said answer thereto of the said Charles B. Stickney, mentioned and referred to, which said record was in the words and figures following, that is to say:

MARY BEARDSLEY
agst.
JOHN BEARDSLEY.

Proceedings in chancery continued and held at the court-house in Norwalk, within and for the county of Huron, in the thirteenth judicial circuit of the court of common pleas of the State of Ohio, before the Honorable Ebenezer B. Sadler, president judge of said thirteenth judicial circuit, and Frederick Sears, Ezra Stewart, and Frederick Wickham, esqrs., associate judges of said court of common pleas for the county of Huron aforesaid, of the term of June, to wit, on the 4th day of June, in the year of our Lord one thousand eight hundred and forty-nine. Be it remembered that heretofore, to wit, on the twentieth day of March, in the year of our Lord one thousand eight hundred and forty-nine, Mary Beardsley, complainant, filed in the clerk's office of the court aforesaid a certain petition in chancery, wherein Mary Beardsley was complainant, and John Beardsley was respondent, which said petition was in the words and figures following, to wit:

Petition.

To the court of common pleas of Huron County, Ohio:

Your petitioner, Mary Beardsley, of Norwalk, in said county, represents that she is now and has been for the last ten years a resident of said county. Your petitioner further represents that she was married to one John Beardsley, (who your petitioner prays may be made
57 party defendant,) in May, 1828, in the city of New York, and that she has lived and cohabited with said John from that date until the day of July, 1848, and that during all that period, she has, at all times, treated said Beardsley as became a virtuous and affectionate wife, discharging all the duties incumbent upon her as such, with fidelity to said John. Your petitioner further represents, that on the first day of June, 1845, and repeatedly between that time and the filing of this petition, the said John Beardsley has committed adultery with one Martha Huson, also with one Huson, daughter of said Martha, also with one Streeter, whose Christian names are unknown to your petioner; also with one Caroline Powers; and also that said John, about the first day of July, 1845, committed adultery with one , who has long since left this county, and whose name your petitioner believes to be Mounser, but which can-

not be truly or more definitely given on account of the lapse of time and the absence of said adulteress. Your petitioner therefore prays that a subpœna issue to said Beardsley, that he may answer the premises, and that on the final hearing hereof the marriage contract between said parties may be dissolved. That your petitioner may have a reasonable allowance for her maintenance, and for such further and other relief in the premises as equity and good conscience may require.

S. F. TAYLOR,
Attorney for Petitioner.

And thereupon the following writ of subpœna issued out of the clerk's office of the court aforesaid, to wit:

[L. S.] STATE OF OHIO, HURON COUNTY, *ss:*

To the sheriff of our said county, greeting:

We command you to summon John Beardsley forthwith to appear before the judges of the court of common pleas, at their term, now held at Norwalk, in said county, to answer the petition of divorce, exhibited against him by Mary Beardsley; and this he will in nowise omit, under the penalty of one thousand dollars, and have then and there this writ.

Witness Henry Brown, clerk of our said court, at the court-house,
58 in Norwalk, this 20th day of March, A. D., 1849.

Attested:

GEO. S. TAMBLING,
Dept. Clerk H. P. C.

And afterwards, to wit, at the March term of the court aforesaid, in the year last aforesaid, the said sheriff, to whom the said writ was directed, returned the same to the court aforesaid, endorsed as follows, to wit:

Served, by delivering to the within-named defendant a certified copy of this writ, also a copy of the original petition, the 20th day of March, 1849.

BENJ. ELLIS, *Sheriff.*

And thereupon, on motion, this cause was continued until the next term of this court. And afterwards, to wit, on the eighth day of May, in the year of our Lord one thousand eight hundred and forty-nine, the said defendant filed in the clerk's office of the court aforesaid the following answer, to wit:

Answer.

THE STATE OF OHIO, HURON COUNTY, *ss:*

The answer of John Beardsley to the bill of complaint exhibited against him in this court by Mary Beardsley: And the said defendant in answer to said bill or to so much and such parts thereof as he is advised, it is material and necessary for him to make answer unto, says: It is true, and he therefore admits that he entered into a marriage contract with the complainant on or about the fifteenth day of May, A. D. 1828. But this respondent says, that the said contract was at the time of the making thereof, and still is, null and void, for the reason that the complainant at the time of the making of said marriage contract with this respondent was under a legal disability, and could not lawfully

enter into such contract by reason of such disability. That this respondent at the time he entered into said contract with complainant, believed to her to be free from all and every disability, but in this respondent was most grossly deceived and wronged by the complainant and
59 one of her sisters, with whom she resided at that time. And respondent further answering, says, it is not true as charged in said bill that this respondent committed adultery with Martha Huson, nor is it true that he committed adultery with one Huson, daughter of said Martha Huson; that it is not true as charged in said bill, and therefore this respondent denies that he has ever committed adultery with the said Caroline Powers. And respondent further answering, says, that it is utterly impossible for him to say, with even a tolerable degree of certainty, who or what person or persons were intended by Streeter or Huson, whose Christian names are unknown to the complainant as set forth in the said bill; nor does this respondent know, or can he ascertain, who or what person is intended by Mounser; but without waiving any of his right in the premises, to have charges of this sort specifically set forth as to the full names of the persons, time and place of the act. Respondent further answering, says, that each and every charge of adultry in the said bill set forth is untrue, and he therefore denies having committed any of the several acts of adultery in said scandalous bill set forth. And this respondent further answering, says, that the said complainant is possessed of an irritable, unhappy, and jealous disposition, and that she is easily influenced by bad and designing counsel to do wrong, and that she has, as respondent is informed and believes in this present instance, placed herself in the hands and powers of designing and wicked persons, who, knowing her weakness, and to subserve a wicked and vile purpose of their own, have advised and influenced the complainant to commence this libelous and disgraceful proceeding. And this respondent further answering, says, that one Lewis Tappan, of the city of New York, is the owner and manager of Tappan's Commercial Agency, in the said city of New York, and Jairus Kennan, of Norwalk, Huron County, Ohio, is the secret informer and correspondent of the said Tappan in Huron County, where this respondent resides. That about the month of July last, the said Tappan and the said Kennan made a wicked and malicious attempt to injure and destroy the credit of the house of H. Beardsley & Co., of which house this respondent then was and still is a mem-
60 ber, by secretly circulating in the city of New York the report that the said house of H. Beardsley & Co. was about to fail; that J. Beardsley's wife was about to apply for divorce and alimony, and that said J. Beardsley had put his real and personal estate out of his hands, &c., &c., which said report was false and libelous. That about the month of Octocer, 1848, the house of H. Beardsley & Co. caused a suit to be commenced in this court against said Jairus Kennan for said libel; and about the month of November, 1848, they commenced a similar suit against said Tappan in the city of New York, both of which said suits are still pending. Respondent further charges that soon after said suits were commenced, and about the 5th day of December, 1848, the said Lewis Tappan and the said Jairus Kennan employed counsel and caused a petition for divorce to be filed in this court in behalf of the said complainant and against this respondent. That the said bill was framed without the least regard to the truth or to the facts which could be established in the final hearing of the cause, and not with the hope or expectation of obtaining a decree for divorce or alimony against this respondent, but that the said Lewis Tappan and the said Jairus Kennan

caused the said petition for divorce to be filed against the respondent for the purpose of carrying out the said wicked and malicious designs against him by getting up a foul record to be used by them on the trial of the aforesaid several suits for libel against the said Tappan and the said Kennan. That this respondent, soon after the said petition for divorce was filed as aforesaid, commenced preparations for his defence, and for that purpose he caused the depositions to be taken of Charles Rutherford, Anna Maria Stanislaus, and Lewis Stanislaus, Cornelia Mason, Samuel Skinner, and others, copies of which depositions are hereto attached and made part a of this answer. And at the March term, A. D. 1849, of this court, at which term the said cause was set for hearing, this respondent was prepared with his defence, and ready for a hearing. And respondent further saith, the counsel for the complainant had made all the preparation for a hearing at the same term, of which the nature of the complainant's case was capable, and that all the witnesses for whom he had caused subpœnas to be issued were in
61 attendance at said court; yet the counsel for said complainant was not willing that said cause should then be heard, but, on the contrary, made sundry and pertinacious efforts to induce the court to allow said suit to be continued; but this court, regarding the causes urged for continuance by said counsel for said complainant, as insufficient, refused to grant the motion therefor; whereupon the said counsel for said complainant moved the court for leave to dismiss said petition, which motion was allowed, and said petition dismissed, all of which said proceedings of said counsel of complainant tend to confirm this respondent in the belief that it was never the intention or expectation of said complainant's counsel to have a hearing before this court upon said petition, but that it was his intention and expectation to keep said petition pending in this court, for the purpose of vexatiously harrassing this respondent in the premises, and to the end that the fact of its pendancy might have an influence injurious to this respondent in the said suits against said Kennan & Tappan. And this respondent believes, and so charges the fact to be, that the petition of the complainant in this case is filed with a similar intention on the part of those concerned therein, as was the said original petition, and not with the expectation of obtaining a decree for divorce and alimony, according to the prayer of said petition; and this respondent, having fully answered, prays to be hence dismissed with his costs, to which, in this behalf, he has been most vexaciously and unjustly subjected.

JOHN BEARDSLEY.

Exhibits.

MARY BEARDSLEY } In Huron County common pleas.
vs.
JOHN BEARDSLEY. } Petition for divorce.

The petitioner, or her attorney of record, will take notice that depositions in this case will be taken by the defendant at the house of Louis Stanislaus, in Sandusky City, Erie County, and State of Ohio, on
62 Wednesday, the 17th day of January, A. D. 1849, between the hours of 10 o'clock a. m. and 2 o'clock p. m. of the said day.

January 15, 1849.

J. BEARDSLEY, *in person.*

Served a true copy of the within notice on Mary Beardsley.
January 16, 1849.

GILES SLOCUM.

Depositions of witnesses taken in a cause pending in the court of common pleas of Huron County, wherein Mary Beardsley is complainant, and John Beardsley is defendant, in pursuance of the notice hereto attached, and at the time and place therein mentioned, taken on the part of the defendant; present, defendant in person; plaintiff absent.

Louis Stanislaus, of Sandusky City, County of Erie, Ohio, being first duly sworn, as hereinafter certified by me, and being of lawful age, on his solemn oath deposes and says as follows:

Question by defendant. Are you related to the complainant, and, if so, in what degree?

Answer. I am the husband of Anna Maria, sister of complainant.

Question by same. How long have you been acquainted with complainant?

Answer. I have been acquainted with complainant since A. D. 1822.

By same. State what you know of her disposition and temperament.

Answer. By what I know and have heard stated, she must be of a violent disposition. Her brother John, now deceased, informed me before his decease frequently that she tried to make difficulty among her brothers and sisters, and I also know of the same disposition of mind on her part is bad.

By same. Do you believe her to be of sane mind on all subjects and at all times?

Answer. I should say that on the subject of jealousy of other women, she was not right in her head.

By same. How long have you been acquainted with the defendant?

Answer. I have known defendant since A. D. 1833.

By same. So far as you know, how has he treated his wife and family, and how has he provided for them?

63 Answer. To my knowledge, having occasionally visited them, and having resided in the same place about eighteen months, I have always seen defendant treat complainant with kindness and regard, having provided his family with the comforts of life fully and amply.

By same. Do you think it would be possible for any person to live with her any great length of time, without her making difficulty with him?

Answer. I think it impossible that complainant should be able to live with a husband without having difficulty, by reason of her jealous disposition, or aberration of mind, on that subject. Her disposition otherwise is bad.

LOUIS STANISLAUS.

Anna Maria Stanislaus, of Sandusky City, Erie County, Ohio, of lawful age, being by me first duly sworn on her solemn oath, deposes and says as follows:

Question by defendant. Are you related to the complainant, and if so in what degree?

Answer. She is my sister.

Question by same. Have you been much together in childhood?

Answer. We were raised together from infancy.

Question by same. State what you know of her disposition and temper.

Answer. She is of a violent disposition; and when under the influence of her temper, I don't think she cares what she says or does, and don't think she knows whether she tells the truth or otherwise, and I don't

think any person could live with her any length of time in peace. These statements are the result of my own experience with her.

Question by same. How long have you been acquainted with defendant?

Answer. Since A. D. 1833.

Question by same. How has defendant treated his family?

Answer. With kindness.

Question by same. How has he provided for his family?

Answer. As far as I know and have seen, he has provided amply for them.

Question. Have you had the means of knowing how defendant did provide for his family?

Answer. I have been in the habit of visiting in the family for a number of days at a time, and have resided in the same village with defendant for about eighteen months, and for several years past within a few miles.

Question. Do you think her of sane mind on the subject of jealousy?

Answer. I do not; she cannot be, or she would not say what
64 she does, or do what she does, I think.

ANNA MARIA STANISLAUS.

I, John M. Brown, a justice of the peace in and for the township of Portland, in the county of Erie, Ohio, do hereby certify that the above-named Louis Stanislaus and Anna Maria Stanislaus were, by me, first duly sworn to testify the truth, the whole truth, and nothing but the truth, and that the foregoing depositions by them respectively subscribed, were reduced to writing by me, and were taken at the time and place specified in the enclosed notice. In testimony whereof, I have hereunto set my hand, this 17th day of January, A. D. 1849.

Writing depositions, $1 25. Paid by defendant.

JOHN M. BROWN,
Justice of the Peace.

In Huron County court of common pleas.

MARY BEARDSLEY *against* JOHN BEARDSLEY. } Petition for divorce.

The complainant, or her attorney of record, will take notice, that depositions in this cause will be taken by the defendant at the office of Frank Sawyer, in Norwalk, Huron County, Ohio, on Thursday, the 1st day of February, A. D. 1849, between the hours of 9 o'clock a. m. and 8 o'clock p. m. of said day.

JOHN BEARDSLEY, *in person.*

Received a copy of the within, January 30th, 1849.

S. F. TAYLOR,
Complainant's Att'y.

Depositions of witnesses taken in a cause pending in the court of common pleas (in chancery) of Huron County, Ohio, wherein Mary Beardsley is plaintiff, and John Beardsley is defendant, and for said
65 defendant, in pursuance of the notice hereto attached, and at the time and place therein mentioned; John Beardsley, the defendant, and S. F. Taylor, attorney for plaintiff, being present.

Charles Rutherford, of the county of Huron, of lawful age, being first duly sworn by me, as hereinafter certified, deposes and says as follows:

Question by defendant. Are you related to complainant?

A. I am; she is my sister.

Question by the same. How long have you been acquainted with defendant?

A. My acquaintance commenced with defendant before his marriage with complainant.

Question by same. Have you the means of knowing how the defendant has treated the complainant, whether kindly or otherwise? and if so, state.

A. The greater part of the time since the marriage I have been an inmate of the house, either as a boarder or at work for the defendant, and know the manner in which the defendant has treated his family. The defendant has been uniformly kind and indulgent; his house has always been amply furnished, and provisions and wardrobe for his family always ample.

Question by the same. How has the complainant treated the defendant since the marriage?

A. Her treatment has been unkind.

Question by the same. State such particular unkind acts as you now recollect, on the part of complainant to defendant.

A. I lived with the family in Lanesborough, in Massachusetts, and knew that the complainant was jealous of several respectable ladies in that place; that the complainant was irritable and passionate, and frequently had fits of phrensy (for I can call them nothing else,) and when under the influence of her passions, she did not seem to know what she did or said; I have frequently known her during these fits of phrensy to fly at the defendant in a violent manner and clinch him, and have known defendant's mother to take hold of complainant and take her off of defendant and seat her in a chair. These attacks were frequent on defendant. The ladies in Lanesborough, of whom she was jealous, were above suspicion.

Question by the same. State what her conduct has been since the parties removed from Lanesborough.

A. The parties came to Norwalk in the year 1832, and I came the following year, that is, in 1833, and since that period have lived in
66 the family of the defendant the greater part of the time. The conduct of the complainant towards the defendant has been since that time similar to what it was, as I have before stated, in Lanesborough. There was not a lady who was in the habit of visiting at the house but of whom she was jealous; it made no difference how respectable they were; and I know that no ladies but those who were respectable did visit there. If she saw defendant conversing with a lady, or if she heard of his having conversed with any lady, she was always jealous of them, and would call them whores and strumpets. This language she would use in the presence of defendant and her daughter and myself.

Question by same. State such acts of violences on part of complainant towards defendant as you now recollect of.

Answer. I have frequently known her to commence so without any cause that I knew of, and fly at the defendant when at the table; but usually she grew violent, and used such language that I could not stand it, and left the house. I have frequently known that the defendant was obliged to leave the house after the usual time of going to bed, and that defendant would sleep at the store, on a pile of sheeting on the counter, and have frequently known the complainant to follow the defendant when he was leaving the house, as far as the gate, and talk in a loud and violent tone, accusing him of going to see other

women, and would tell him: "Now, you can go out and see Mrs. Stone and Mrs. Beardsley," and use the term "whore" and "strumpet" at these times. By Mrs. Stone I understood her to mean Ezra M. Stone's wife. I never knew defendant to use any harsh language towards complainant, or to retaliate in any manner when she made these attacks upon him; the worst thing I ever knew him to say to her was one morning at the breakfast table, she made one of her attacks upon him; defendant told her that he was not prepared for such a dissertation at that time.

Question by same. State whether her fits of passion were caused exclusively by her jealousy of other women.

Answer. I should think not; she has been from childhood of a violent and bad disposition; when we were children, we had to use the utmost precaution to avoid violence on her part. I have two scars on my hands now, made by her, one by striking me with a hammer, and the
67 other by drawing a knife across my hand; these wounds were inflicted by her when she was in a fit of rage.

Question by same. Has she been any worse since she became jealous of Mrs. Powers and Mrs. Beardsley than she was previous to that time?

Answer. She has not been.

Question by same. Do you think it possible for any person to live in peace with her?

Answer. I do not; for no one ever did.

Question by same. Do you know of defendant's bearing marks of violence inflicted by complainant?

Answer. I have seen his face marked, and in one instance his arm was lame; have seen his eyes black in two or three instances, but did not see it done; I was satisfied, however, that it was done by complainant. Defendant sought always to conceal these things and not make them public.

Question by same. What was the conduct and language in presence of her daughter?

Answer. When she was in these fits of passion and jealousy, her conduct and language were calculated to corrupt the morals and character of her daughter; the terms strumpet and whore, and the name of God, were frequently interlarded with her conversation. I have frequently heard defendant beg of her to choose some other time than when her daughter was present for such language.

Question by same. What was your opinion as to the personal safety of defendant while living with complainant?

Answer. From what I have seen, I should not think defendant's life was safe.

Cross-examined:

Question. State your age, where you reside, and what is your occupation.

Answer. I am about thirty-six; I reside in Norwalk, and am a clerk in the store of H. Beardsley & Co.

CHARLES RUTHERFORD.

S. F. Taylor, of Milan, Erie County, of lawful age, being by me first duly sworn, as hereinafter certified, deposes as follows:

Question by defendant. Have you ever seen the complainant?

Answer. I cannot answer if it has any materiality in the case, without revealing what belongs to me exclusively, as counsel for complainant.

Question by defendant. I do not seek to draw out any confidential

communications made to you as counsel; I simply want to know
68 whether you have ever seen complainant?

Answer. I cannot answer without revealing such facts as might lead to the inference of other facts, that belong to me as counsel.

Question. Do you refuse to answer the question, Have you ever seen the complainant?

Answer. I do, as her attorney.

Question by defendant. By whom were you retained as attorney for complainant?

Answer. By complainant, and by nobody else.

Question by same. Did she retain you in person, or by a third person?

Answer. I cannot answer that question without revealing facts which I have no right to reveal, as counsel.

Question by same. Have you ever seen the complainant before or since, or since the commencement of this suit?

Answer. I have seen her, or seen a person called Mrs. Beardsley.

Question by same. Where did you see her, and when?

I saw a lady that was called Mrs. Beardsley sometime ago, but cannot tell the time when.

Question by same. How long ago?

Answer. I think about two years ago.

Question by same. Did you speak to her?

Answer. I did not.

Question by same. Have you ever spoken to her?

Answer. I cannot say that I have.

Question by same. Do you now recollect to have ever seen her except on the occasion above referred to?

Answer. I do not.

Question by same. Did you frame the bill in this case?

Answer. I did.

Question by same. Were you employed by her personally, or by some other person for her as her agent?

Answer. I cannot answer this question, in my opinion, without revealing facts that belong to me alone as counsel, and which as an attorney I have no right to reveal.

Question by same. I do not ask you to reveal a single confidential communication; I simply wish to know whether you are retained by the complainant in this case in person, or by some other party having an interest therein?

Answer. I have not seen the complainant in person, and I know of no other person, and have heard of none other that has any interest in this suit.

Question by same. Were you requested by any person to file the bill in this case?

Answer. I was spoken to on that subject, and told that complainant wanted me to act as her attorney in this case. But I was never requested to act in the matter for or on account of any one else.

Question by same. By whom were you spoken to?

Answer. From the course taken in this examination, and from
69 the declarations of defendant, I do not believe I can answer it without revealing facts that are my own property as counsel, and that I have no right to reveal.

Question by same. You say you were spoken to file a bill in this case; was that request a verbal or a written one?

Answer. It was verbal.

Question by same. Was the request made by a man or a woman?

Answer. It was a man.

Question by same. Where does he reside?

Answer. In Norwalk.

Question by same. What is his profession?

Answer. I can answer no question tending to show his identity without, in my opinion, revealing facts that I have no right to reveal as attorney.

Question by same. Do you know whether the person who requested you to file this bill is now or ever has been the reporter of Lewis Tappan's Commercial Agency, or Cleveland's Commercial?

Answer. I do not know anything of either of these agencies.

Question by same. How do you know that the person was authorized by the complainant to employ you to file a bill in this case?

Answer. I have no positive knowledge that she did authorize him.

By the same. How then can you swear that you were retained by the complainant?

Answer. I can only say from the facts that I have been retained by nobody else, except in doing an errand, as I supposed that at my request the dates and circumstances necessary to file the bill, and that I think could not have been supplied by anybody else since finished, and that I have since received the names of witnesses and the facts to which they would attest in handwriting said to be hers as I believe.

S. F. TAYLOR.

The above depositions of Charles Rutherford, S. B. Skinner and S. F. Taylor, objected to on the ground that the questions are leading, the answers are from heresay, and the matter irrelevant.

S. F. TAYLOR,
Complainant's Attorney.

Also Samuel B. Skinner, of the county of Huron, Ohio, of lawful age, being first duly sworn by me, as hereafter certified, deposes as follows:

I went into the family to live in the year 1845; since that time
70 have lived in the family up to two months ago with the exception of about ten months; defendant has always treated his family well, and has been more forbearing than I supposed a man could be in consequence of the conduct of the complainant; I think the defendant was more kind to his family than men in general; I never heard him say an unkind word to a member of his family in my life; nor did I ever see him manifest the least angry feeling; I have seen his patience sorely tried by complainant's abusive language and conduct; the defendant always put up with it without any apparent desire to retaliate, and always tried to pacify complainant by a kind course.

Question by same. What has been the complainant's conduct in his family?

Answer. I think her conduct has been very bad indeed; she made it constant business to traduce defendant to his clerks and strangers; soon after I went into his family, and when I was a comparative stranger, she showed me a piece of scurrillous poetry, and said that a married woman across the way had given it to a married man.

Question by the same. Do you consider complainant a woman of good disposition?

Answer. I consider her a woman of bad disposition aside from her jealousy, and do not think that any man could live with her in peace.

Question by same. Did you ever know her to attack defendant?

Answer. I recollect that one Sunday afternoon, that defendant came to the house—complainant asked him why he did not go across the road and see his sister across the lane—and said he thought more of their

company than of her; defendant paid no attention to this for some time; but after she had continued this kind of language, and putting along close to him and strike at him, defendant said to her, he was sorry she would thus destroy herself and family; this striking was that she would thrust her hand nearly into his face, and that she was trying to provoke the defendant to defend himself; she went on so finally that defendant had to leave the house before eating his supper.

Question by same. Describe her appearance when in one of those tantrums.

Answer. I could not described her unless I could paint her; I thought at that time a good whipping would do her good; she would lose all control of herself when her passions were aroused, and was in a
71 perfect phrensy; her anger was easily excited, without any apparent cause; she was under the influence of her passions a greater part of the time; her passions were so ungovernable that I thought that defendant's life was endangered by living with her; I know of the defendant coming to the store one morning with a black eye; I don't know from occular demonstration how the eye came black, but heard that complainant had had another fit, and that in my mind accounted for it; I think the defendant endeavoured to prevent these things from being made public; and in fact requested me after I had witnessed these scenes, not to mention them.

Cross-examined:

I live at present in Norwalk.

Question. Was the alleged cause of these extreme fits jealousy?

Answer. I did not know that it was, except once; at other times it was on his business, but I never thought she had any cause.

Question. Do you know of any conduct on part of defendant that would justify complainant's jealousy?

Answer. I do not.

Re-examined:

Question by defendant. At what time and under what circumstances did complainant leave her house?

Answer. In the spring of 1848, while defendant was in New York, about three weeks previous to his return; complainant abandoned her house, and that house was as good a one as any person could desire; she left her daughter at the house unprotected and alone, with a servant-girl.

S. B. SKINNER.

I, Franklin Sawyer, notary public, in and for the County of Huron, State of Ohio, do hereby certify that the above-named Charles Rutherford, Samuel B. Skinner, and S. F. Taylor, were by me first duly sworn to testify the truth, the whole truth, and nothing but the truth, and that the foregoing depositions, by them respectively subscribed, were reduced to writing by me, with the exception of a part of the deposition of S. F. Taylor, which were written down by himself, and were taken at the time and place specified in the enclosed notice.

In testimony whereof, I have hereunto set my hand and official
72 seal, this first day of February, A. D. one thousand eight hundred and forty-nine.

FRANKLIN SAWYER, [S. L.]
Notary Public.

Notary fees, $3 90. His costs and witness' fees paid by J. Beardsley, defendant.

In Huron County common pleas.

MARY BEARDSLEY } Petition for divorce.
vs.
JOHN BEARDSLEY. }

The complainant, or her attorney of record, will please take notice that depositions in this case will be taken by the defendant, at the house of Stephen Lapham, in Willoughby, in the County of Lake and State of Ohio, on Thursday, the 22d day of February, A. D. 1849, between the hours of 9 o'clock a. m. and 9 o'clock p. m. of said day.

Norwalk, February 17, 1849.

J. BEARDSLEY, *in person.*

Depositions of witnesses taken in a case pending in the common pleas court of Huron County, State of Ohio, wherein Mary Beardsley is plaintiff, and John Beardsley is defendant, and for the plaintiff, in pursuance of the notice hereto attached, and at the time and place therein mentioned, the defendant being present.

Stephen Lapham, of the county of Lake, of lawful age, being first duly sworn by me, as hereinafter certified, deposes and says as follows:

Question by defendant. Are you related to the complainant in this cause; if so, state what degree?

Answer. I am not related to her by blood; I married her
73 sister.

Question. How long have you been acquainted with her?

Answer. About fourteen years.

Question. State what you know of her temper and passions.

Answer. She has an ungovernable and bad temper.

Question. What do you think of the possibility of any one living with her any great length of time in peace?

Answer. I believe it would be impossible for any man to live with her any great length of time in peace.

Question. How long have you been acquainted with the defendant?

Answer. About the same length of time that I have with the plaintiff.

Question. During that time, how has he, the defendant, treated his family, and how has he provided for them?

Answer. So far as my knowledge extends, he has always treated them kindly, and provided for them well.

S. LAPHAM.

Catherine Lapham, of the county of Lake, of lawful age, being first duly sworn by me, as hereinafter certified, deposes as follows:

Question by defendant. How are you related to the complainant?

Answer. I am her sister.

Question. What is her disposition and temper?

Answer. She is very quick-tempered, and a violent temper.

Question. How has the defendant treated and provided for his family?

So far as I know, he has treated his family with kindness, and provided for them well.

CATHERINE A. LAPHAM.

I, H. A. Sharpe, a justice of the peace in and for the township of Willoughby, in Lake County, Ohio, do hereby certify that the above-named Stephen Lapham and Catherine Lapham were by me first duly sworn to

testify the truth, the whole truth, and nothing but the truth, and that the foregoing depositions by them respectively subscribed were reduced to writing by me, and were taken at the time and place specified in the enclosed notice.

In testimony whereof, I have hereunto set my hand this 22d day of February, in the year 1849.

H. A. SHARPE, *J. P.*

74 MARY BEARDSLEY *against* JOHN BEARDSLEY.

Petition for divorce and alimony, pending in Huron common pleas.

The complainant, or her attorney, will take notice that depositions will be taken in the above cause, on the part of the defendant, at the house of Platt Benedict, in the village of Norwalk, Ohio, on the 9th day of March, instant, between the hours of 9 o'clock a. m. and 3 o'clock p. m. of said day.

Norwalk, March 8, 1849.

E. M. STONE, *Deft's Att'y.*

Personally served a verbatim copy of the within notice, on the 8th of March, 1849.

W. N. HALL.

Depositions of witnesses taken in a cause pending in the court of common pleas in and for the county of Huron, State of Ohio, wherein Mary Beardsley is complainant and John Beardsley defendant, and for said defendant, in pursuance of the notice hereto attached, and at the time and place therein named—present, defendant and E. M. Stone, his attorney, and, a portion of the time, complainant.

Cornelia Mason, of Richland County, being by me first duly sworn, as hereinafter certified, deposes as follows:

Question by defendant's attorney. Are you acquainted with the parties in this cause; if so, how long, and when did you become acquainted with them?

Answer. Witness is acquainted with them; the parties boarded with witness about fifteen or sixteen years ago.

Question by same. What was the deportment of John Beardsley towards his wife during the time he and his wife boarded with you?

Answer. Never saw any unkind treatment on the part of the defendant, and witness thinks that if the complainant had been as kind to the defendant as defendant was to complainant, there would have
75 been no difficulty.

Question by same. What was the deportment of complainant towards her husband, the defendant—was it kind, or otherwise? What acts of violence, if any, have you ever seen complainant use towards defendant, and what conversation of a provoking nature, if any?

Answer. Complainant's deportment was unkind; she spoke unkindly, and deported herself towards him unkindly a great proportion of the time; in the spring of the year 1833, as witness thinks, she saw complainant strike defendant on the head repeatedly with her shoe; the history of this occurrence is as follows: Defendant, in the forenoon of a certain day in said spring of 1833, had ridden out, as witness thinks, to

Peru, a village a few miles from Norwalk, and, as it happened, there was a company of young ladies riding in the same direction that defendant was to go in getting to Peru; defendant returned in the afternoon, about two o'clock, from his ride, and went to his room, as usual: defendant had been in his room but a short time when he came to the head of the stairs (his room being in the second story) and called witness, who went up stairs and into the room and found the parties both angry; defendant then commenced explaining to witness the cause of the difficulty; he said the cause of the trouble was complainant's jealousy of him, accusing him of bad motives in taking the morning ride, meaning that he had ridden out with the ladies above; he said he did not mean anything wrong; some other things were said by both parties which witness does not clearly recollect, when complainant spoke and said to defendant: "You smooth-faced devil, you can make things as smooth as can be on your side." The young ladies above alluded to were Miss Mary Buckingham, now wife of Joseph M. Root, Lucy Preston, now wife of Frederick Wickham, and Hannah Vandercook, since the wife of Albert Baker, and now deceased; whether this last-named lady was one of the party, witness is not very certain; she thinks it may have been Miss Williams, now the wife of M. W. Goodnow; with these young ladies complainant accused defendant of going out to ride; witness then remonstrated with complainant for accusing these ladies, as they were respectable; defendant also remonstrated with complainant for making such remarks as she did of these ladies, saying also that they were respectable; after
76 this complainant set herself down upon a trunk, which was placed by the side of the wall, and commenced beating her head violently against the wall; witness desired defendant to prevent complainant from injuring herself by thus pounding her head; he then went towards her for the purpose of stopping her; then complainant reached down and took the slipper from her foot, and as defendant stood stooping for the purpose of preventing her from beating her head, she struck him about his head repeatedly with the slipper before he could get out of her reach; on this same occasion defendant showed to witness a scar upon his arm, which he charged her with making with the blade of a penknife; upon his thus charging her she replied: "I wish it had been in your heart," referring to defendant's heart.

Question by same. From your observation of the conduct of complainant, and from what you saw and knew of her temper, could any man, in your opinion, live with complainant as man and wife ought to live?

Answer. Witness thinks no man could live with complainant in peace, as she would, for no cause whatever, fly into a rage, when she seemed to have no control whatever over her temper, and on the occasion above referred to in the spring of 1833, witness advised defendant to separate and live apart from complainant, for the reason that defendant could not live in happiness with complainant.

Question by same. Are you about to leave the county of Huron, if so, when and where are you going, and when do you expect to return?

Witness intends to leave Huron County to-morrow for her residence in Richland County, and at present entertains no expectation of returning to Huron County.

CORNELIA MASON.

I, Charles E. Pennewell, a notary public in and for the county of Huron, Ohio, do hereby certify that the above-named Cornelia Mason was by me first duly sworn to testify the truth, the whole truth, and nothing but the truth; and that the foregoing deposition by her subscribed was

reduced to writing by me, and was taken at the time and place specified in the enclosed notice.

In testimony whereof, I have hereunto set my hand and affixed
77 my official seal, this 9th day of March, 1849.

[SEAL.] CHARLES E. PENNEWELL,
Notary Public.

And afterwards, to wit, on the day and year first aforesaid, to wit, on the 4th day of June, in the year of our Lord one thousand eight hundred and forty-nine, came the parties by their attorneys, and this cause coming on to be heard, the said complainant, by her solicitor, comes into court and refuses further to prosecute this suit; and it is thereupon ordered that said bill be dismissed, and that the defendant go hence without delay.

E. B. SADLER,
Pres't Judge.

THE STATE OF OHIO, *Huron County, ss:*

I hereby certify that the foregoing is truly taken and copied from the records of the proceedings of the court of common pleas within and for the said county of Huron.

In testimony whereof, I do hereto subscribe my name and affix the seal of said court, at Norwalk, this 20th day of October, A. D. 1851.

[SEAL.] GEO. S. TAMBLING,
Deputy Clerk of the Court of Common Pleas of said Huron County.

I, Ebenezer B. Sadler, president judge of the court of common pleas in and for the county of Huron and State of Ohio, do hereby certify that George S. Tambling is deputy clerk of said court, and that his attestation aforesaid is in due form of law, and that in all acts by him so done, full faith and credit are and ought to be given in judicature and thereout.

E. B. SADLER,
Pres't Judge.

The defendant's counsel objected to the admission of the said record in evidence, on the same grounds on which the said counsel had objected to the said 14th direct interrogatory, and to the said answer of the
78 witness Stickney thereto, which said objections were overruled by the court, and said record was allowed to be given in evidence on the part of the plaintiffs, to which said decision of the court the defendant's counsel then and there excepted.

The plaintiffs' counsel then proposed to read to the jury the whole of said record; but to this the defendant's counsel objected, and insisted that if the said record was at all or for any purpose admissible in evidence against the defendant, only so much thereof as showed the nature of the suit, and the time of the commencement thereof could be read, and especially that the answer of John Beardsley, the defendant therein, could not be read against the defendant in this action, which said objection was overruled by the court, and the whole of the said record was allowed to be read by the plaintiff's counsel, and was by them read to the jury, to which decisions of said court the defendant's counsel did then and there except.

Benjamin Douglass, a witness called on the part of the plaintiffs, testified as follows:

In 1848 I was employed in the mercantile agency of the defendant under a clerk's agreement. I attended generally to the business of the agency. I had the principal charge.

The witness was then asked by the plaintiff's counsel: Had the defendant, in July, 1848, a correspondent in Norwalk, Ohio, and, if so, who was such correspondent?

This question was objected to by defendant's counsel, on the ground that the same was wholly irrelevant and immaterial to the matters in issue in this action, which objection was overruled by the court, and the question decided to be relevant and material, to which decision the defendant's counsel then and there excepted.

The question being repeated the witness declined answering the same, and stated as a reason for so declining that the witness was, at the time referred to, the confidential clerk and agent of the defendant, in the management of the business of defendant's mercantile agency; that the
79 defendant was under a pledge to all his correspondents not to disclose their names, and that the witness had come under the like pledge at the time he entered the defendant's employment, and that he could not, without breach of faith, answer the said question.

And hereupon the defendant's counsel objected to said question on the ground that each and all of the several communications concerning the plaintiffs, made or read by the defendant or his clerks to the plaintiffs' witnesses, as deposed to by said witnesses, were, by the occasions and under the circumstances which lead to and accompanied such communications, confidential and privileged communications, for which no action against the defendant could be maintained by the plaintiffs, except upon proof by them of express malice in the defendant; that in this case malice could not be inferred from the words, or from the publication of said words alone, but that the plaintiffs must go further, and in order to maintain their action must affirmatively show that the defendant did not act in good faith, but was governed by a bad motive, and took advantage of the occasions aforesaid to injure the plaintiffs in their character or standing; and also, that the said privilege, in respect to said communications, applied not only to the defendant, but to his correspondent and his confidential clerk; and that, therefore, the said witness could not be compelled to disclose the name of such correspondent, it being, in the nature of things, essential to the usefulness and existence of mercantile agencies, like that carried on by the defendant, that the names of the corresponents of such agencies should be received and kept by the proprietors thereof confidentially and as a secret. But his honor the judge ruled and decided that, although the defendant might lawfully establish and carry on an agency for the purpose of obtaining information concerning the standing and credit of merchants and traders in the interior of the United States, with the view of furnishing such information to merchants in the city of New York, who might apply to said defendants for such information in the course of their business, and although the communication by the defendant personally to the merchant employing and applying to him personally of information so obtained by defendant, would be privileged, however unfavorable it might be to
80 the standing or credit of the party to whom the same related, so as to exempt the defendant from an action therefor, except on proof of express malice; yet that to enable the defendant to claim such privilege, in respect to information defamatory to the party to whom it refers, such information must have been kept by the defendant, exclu-

sively to himself, except when communicated by himself personally to a merchant personally applying therefor; and that if such defamatory information was made known by defendant, or voluntarily permitted by him, by being entered on his books, or otherwise, to become known to the clerks or other persons in his employ, or to any one of them, or if the same was communicated by the defendant or by any person in his employ, with his authority or permission to the clerk or agent of the merchant desiring the information, such publication would be libellous, and not within the rule of law regarding privileged communications; and he also ruled and decided that the witness was not privileged or excused by the confidential character of his employment, as stated by him, from answering the said question—to which said several rulings and decisions, and to every part thereof, (except so far as the said judge affirmed the lawfulness of the defendant's said business, and the application thereto in the cases stated by said judge of the rule of law, as to the privileged communications,) the defendant's counsel did then and there except.

The said witness was then asked by the plaintiff's counsel the following question:

In July, 1848, had Mr. Lewis Tappan an agent or correspondent in the town of Norwalk, in the county of Huron, and State of Ohio; to which question the said witness declined to answer, for the reasons before by him stated, and also for the further reason that his answer to the said question would tend to accuse or criminate him in a charge of an indictable misdemeanour; but his honor the judge then and there ruled and decided that the witness was bound to answer the question; and on his still declining so to do, he was adjudged by the court to be guilty of a contempt of court in the face of the court, and was sentenced to be committed to prison for his said offence, there to remain until discharged by due course of law.

81 William Cutter, a witness called by the plaintiffs' counsel on their part, testified as follows:

I was never in Mr. Lewis Tappan's employ; neither in his mercantile agency or otherwise; in the summer of 1849 I entered the employ of Tappan & Douglass, who succeeded to Mr. Lewis Tappan in the mercantile agency established by him, and have been in their employ since; the firm is composed of Arthur Tappan and Benjamin Douglass; I do not know precisely at what time the firm of Tappan & Douglass succeeded to the business; whether in the summer or spring of 1849; I never had any conversation with Lewis Tappan about his business, nor since I have been in the office have I ever read any of the correspondence addressed to Lewis Tappan.

The plaintiffs' counsel then read in evidence the answer of Sebastian F. Taylor, a witness examined on the part of the defendant, under his aforesaid commission, in reply to the defendant's fifth direct interrogatory, which said interrogatory was as follows:

5th interrogatory. "Was the plaintiff, John Beardsley, on or about the first day of July, 1848, a married man? If so, was it or not, at that time, generally reported in said town of Norwalk that his wife was about to file a bill or petition against him for divorce and alimony, or either, and which of them? Do you know whether or not the wife of said plaintiff, John Beardsley, was then and there about to file a bill or petition against him for such purpose? If yea, set forth fully and particularly all such your knowledge. In what court was the bill or petition, if any, about to be filed? Was any such bill or petition, in behalf of the wife of the said John Beardsley, filed? If yea, when and in what court; and

if you have a copy thereof in your power produce the same to the commissioners, and state how you know the same to be a copy. In the month of August, 1848, did or did not the like report, as to the filing of such bill or petition of the wife of the said plaintiff, John Beardsley, exist, and continue at and in the vicinity of the said town of Norwalk? Was it or not then and there reported that the petition of Mrs. Beardsley, wife of the said John Beardsley, for divorce, would soon be
82 filed? Do you know whether or not, in the said month of August, 1848, the bill or petition of the wife of said John Beardsley, for divorce from him, had been prepared, and whether or not such bill or petition was then soon to be filed? If yea, set forth fully and particularly all such your knowledge in the premises."

And which said answer was as follows:

To the 5th interrogatory. John Beardsley was a married man on the 5th of July, 1848; he knows nothing about any reports in Norwalk, or elsewhere, about the filing of a petition by his wife for a divorce and alimony at any time; all he knows about that subject is, that he was applied to, he thinks, in October, 1848, to file such a petition as attorney, and that he did file a petition in favor of the wife of said John Beardsley, against him, on the 5th day of December, 1848, for a divorce and alimony, in the court of common pleas, of Huron county, Ohio; that said petition was probably drawn about the last of November, 1848; that he has no copy of said petition in his possession or control.

The defendant's counsel objected in season to the said interrogatory, and to the answer thereto as irrelevant, incompetent, and inadmissible, as against the defendant in this action, which objection was overruled by the court, and the said answer to the said interrogatory allowed to be read, to which said rulings and decisions the defendant's counsel then and there excepted.

The plaintiffs' counsel then offered and proposed to read to the jury the supplementary or additional notice given by the defendant's attorney to the plaintiffs' attorney; that said defendant on the trial of the cause would prove and give in evidence the truth of the words set forth in the plaintiffs' declaration, and insisted on their right to read said notice as evidence of malice in the defendant; but to this the defendant's counsel objected, on the ground that the said notice was not for any purpose admissible as evidence to the jury against the defendant, which objection was overruled by his honor, the judge, who allowed the said notice to be read, and it was accordingly read by the plaintiffs' counsel to the jury, to which said several decisions of the said judge touching the said notice, the defendant's counsel then and there excepted.

83 The evidence on both sides having been closed, and the case summed up to the jury by the counsel for the respective parties, his honor the judge then charged and instructed the jury as follows:

Judge's charge.

1st. That the first question for the jury was, whether or not the words proved by the plaintiffs to have been read to their prejudice by the defendant or his clerks were, in effect and substance, the same as those set forth in the plaintiffs' declaration; that the court had decided as matter of law, that the variance between the libellous words, as written and contained in the defendant's record book, and the words set out in the plaintiffs' declaration, was not fatal to the plaintiffs' right of action, because the law did not require the plaintiffs to prove that the defendant had written and published the identical words set forth in their declaration.

That it was sufficient to prove that the words written and published by defendant were, in effect and substance, such as were set forth in the declaration; that whether or not, in the present case, the words proved by the plaintiffs to have been published by defendant or his clerks were, in effect and substance, the same as those set forth in the declaration, was not a question of law, but a question of fact for the jury to decide, and that if they, upon the evidence, should find that the words published were, in effect and substance, the same as those set forth in the declaration, the plaintiffs would in this respect be entitled to their verdict.

2d. That the words in question relating to the plaintiffs as merchants, and implying a want of credit and responsibility in the firm, and a want of integrity in its members, were actionable per se, and if published by defendant, or by any person acting for him by his authority, he would be responsible in damages therefor to the extent of the injury sustained by the plaintiffs as partners in their joint trade and business, unless it should appear that the words were justified by the occasion and circumstances attending their publication, or by their truth.

3d. That the business of the mercantile agency established and
84 conducted by the defendant was, in its general purposes and features, as disclosed in the evidence, both lawful and useful, and that information, however defamatory, communicated by the defendant in good faith, and believing it to be true, to merchants applying to him for information, to guide them in their business, was in law a privileged communication, for which no action could be maintained by the party defamed by it, except on proof of express malice.

4th. That the merchant to whom such information was given, being lawfully entitled to ask for and to receive it, and the defendant, if acting in good faith, being lawfully authorized to give it, there was, in the sense of the law in such a case, no publication, and, therefore, no ground of action; and that if the defendant in this suit had only communicated by himself personally to such of his subscribers as personally made enquiries concerning the standing and credit of the plaintiffs, the reports complained of, the case would have come within the rule of law as to privileged communications. But in this case the plaintiffs had given evidence to show that the words in question had been entered into defendant's record-book by some person other than defendant himself; that they were read by Mr. Douglass, defendant's chief clerk, and by several others of his clerks, and in the hearing of such clerks; and that they were also read by Mr. Douglass, and perhaps by another clerk of defendant, to clerks of subscribers, sent by their employers to make enquiries at the agency; that all such readings to or by persons other than the defendant and the merchant actually and personally interested in obtaining information concerning the plaintiffs was unlawful. That no person other than the merchant himself asking for information had, in law, a right to read or hear said words, and to him they could be lawfully communicated only by the defendant himself, and that the reading of said words by any person in defendant's employ, with his permission, or the reading of said words by defendant himself, or by any person in his employ, to the clerk of a merchant subscriber requesting information concerning the plaintiffs, was an unlawful publication, not at all within or protected
85 by the rule of law as to privileged communications, and that for every such publication proved in this case the defendant was responsible in damages to the plaintiffs, inasmuch as the words were actionable in themselves, and no attempt has been made on the trial to prove them to be true.

5th. That the defendant having given notice that he would prove the

truth of the defendant's words, alleged to have been published by him, and this notice having been placed on the files of the court and forming a part of the proceedings in this cause, was evidence of malice in defendant, and as such had been properly read to, and was to be considered by, the jury; and that the omission of the defendant's counsel to read the testimony taken on his part under his commission to support the truth of his charges, or to show probable cause for making them, though the exercise of a right allowed by the law and practice, was yet a fact properly to be taken into account by the jury, and which of itself justified a very strong inference that there was no foundation whatever for the reports concerning the plaintiffs published by the defendant.

6th. That even if the publication of the words complained of were originally privileged, yet if the jury should find that they were persisted in and republished by defendant after he or his confidential clerk, Mr. Douglass, had been notified of their being erroneous and unjust to the plaintiffs, this fact would be proof of positive malice, calling for exemplary damages; and in this connection the attention of the jury was called by his honor the judge to the evidence of the plaintiff's witness, Mr. Furman—that on his remonstrating, on or about the 15th day of July, 1848, with defendant's clerk, Mr. Douglass, on the subject of the July report, he (Douglass) promised to write for further information; whether he did so write, or not, did not appear; but it did appear that under date of August 7, 1848, another report was received which was entered on defendant's book, and afterwards repeatedly published by him and his clerks, confirming the former report. This was an aggravation of the offence, and evidence of positive malice, which the jury must take
86 into account, especially as the defendant, by concealing the name of the writer, takes his place and assumes the whole responsibility of the words published.

7th. That although the defendant had given a special notice that he would give evidence to show the truth of the defamatory words published by him, yet, that under a recent statutory provision in the State of New York, the defendant might still give in evidence mitigating circumstances to reduce the amount of damages; and that the previous existence and circulation in the town of Norwalk, Ohio, of reports or rumors tending to disparage the plaintiffs, as partners in the particulars, or either of them, contained in the reports entered on defendant's record-books, and by him, and clerks in the city of New York, read from said books to the witnesses, would be a circumstance tending to mitigate the damages in this case; but that the defendant had not proved, as he might have done, on what day his correspondent's report for July, 1848, was received in New York. That the jury might, therefore, infer that it was received here several days before the 15th of July, and long enough to have gone back from New York to Norwalk, and to have reached that place on its return before the 15th of July; and as the evidence of defendant's witnesses was quite indefinite as to the time in the beginning of July when the reports spoken of by such witnesses began to be circulated in Norwalk, the jury might infer that all the said reports or rumors testified to by defendant's witnesses had originated in and from the publication in New York of said July report of defendant's correspondent, in which case the defendant could derive no benefit in mitigation of damages from such evidence of his said witnesses.

8th. That the defendant having refused to disclose the name of his correspondent, the author of the slanders complained of by the plaintiffs, he, the defendant had taken the place and responsibility of such author in respect to the mitigating of the damages, as well as in all

other respects, and in this action stood in no light more favorable than that in which the said author would have stood had the suit been against him, and that he could therefore only mitigate the damages in the
87 same way and to the same extent as the said original author, if actually the defendant on trial, could be allowed to do.

The defendant's counsel then and there excepted to the whole of the charge and instruction contained in the 1st of the above-stated eight propositions, and requested and prayed the court to charge and instruct the jury that the variance between the libellous words, as set forth in the declaration, and the words as entered in the defendant's record-book, was fatal to the plaintiffs, and that the jury should, therefore, find their verdict in favor of defendant; which said charge and instruction the court refused to give; to which refusal the defendant's counsel then and there excepted.

The said counsel also then and there excepted to the whole of the said charge and instruction contained in the 4th of the said propositions, except the instruction in the first clause thereof, that the giving of information by the defendant to his subscriber personally, and under the circumstances in said clause mentioned, would be, in law, a privileged communication; and instead of the said charge and instruction so excepted to, the counsel for the defendant then and there prayed and requested the court to instruct and charge the jury, in respect to the law of privileged communications, as follows:

First. That the privilege applies to communications made in this case, notwithstanding that the words in question were read by or in the hearing of the clerks employed by the defendant, provided that the jury shall be satisfied from the evidence that such clerks were necessary to the convenient transaction of the business of the defendant's agency, and were confidentially employed by him for and in the transaction of said business; and,

Secondly. That the said privilege applies, notwithstanding that the words in question were read to or in the hearing of the clerks of the merchants' subscribers to the agency of the defendant, provided the jury shall be satisfied from the evidence that such clerks were neces-
88 sary to the convenient transaction of the business of their employers, and were confidentially employed, for and in the transaction of said business.

But his honor the judge refused to charge and instruct the jury in accordance with either of the said prayers, or any part thereof; to which said refusal the defendant's counsel did then and there except.

The defendant's counsel did also then and there except to the whole of the 5th of the said propositions, and to the charge and instructions, and every part thereof therein contained.

The defendant's counsel also then and there excepted to the remarks and observations concerning the evidence of Mr. Furman and the other remarks and observations following the same, contained in the 6th of the said propositions, and to the charge and instructions in the last clause or sentence of said sixth proposition, and the said counsel requested the court to qualify the same by charging and instructing the jury that the publication or repetition of the August report would not be an aggravation of the offence, nor evidence of positive malice, if they, from the evidence, should find that the defendant, at the several times when he so published the said August report, did, in fact, really and honestly believe that the same was true; which said qualifying charge or instruction the said court refused to give; and to such refusal the defendant's counsel did then and there except.

The defendant's counsel also then and there excepted to the remarks and observations on the testimony and to the charge and instruction therewith connected, contained in the latter clause of the 7th of the said propositions, commencing with the words, "But that the defendant had not proved," &c., as not warranted by the evidence in the case, and as repugnant to the testimony of some of the defendant's witnesses.

89 The defendant's counsel also then and there excepted to the charge and instructions contained in the 8th and last of said propositions, and the said counsel prayed and requested the court to charge and instruct the jury that if they, from the evidence, should find that the defendant, at the several times when the said defamatory words were published by him and by his clerks, as deposed to by the witnesses, did really and honestly believe that the said words were true, he, the said defendant, would stand, in respect to the mitigation of damages, in a light different from and more favorable than that in which the author of the words would have stood had the action been against such author; but the court refused to give said charge and instructions so prayed by defendant's counsel; to which refusal of the court so to charge and instruct the jury the defendant's counsel did then and there except.

The jury, under the charge and instructions aforesaid, rendered their verdict for the plaintiffs, with $10,000 dollars damages and six cents costs.

And because the prayers of the said defendant, by his said counsel, and the several rulings and decisions and instructions and charge of said judge, and the several exceptions taken to the same, do not appear by the record of the verdict aforesaid, the defendant has caused the same to be written on this bill of exceptions to be annexed to such record, and has prayed the said judge to set his hand and seal to the same; whereupon the said Samuel R. Betts, the judge before whom the said issue were tried and the said exceptions taken, has hereunto set his hand and seal, the twenty-ninth day of October, in the year of our Lord 1855.

SAM'L R. BETTS. [L. S.]

90

91 U. S. circuit court.

Pleas before the judges of the circuit court of the United States for the southern district of New York, in the second circuit, at the city hall, in the city of New York, in the said southern district of New York, of the 14th day of October, in the year of our Lord one thousand eight hundred and fifty

Witness Roger B. Taney, esquire, Chief Justice of the Supreme Court of the United States.

JOHN W. NELSON, *Clerk.*

SOUTHERN DISTRICT OF NEW YORK, *ss:*

Be it remembered that heretofore, to wit, on the twenty-third day of September, as yet of April term, in the year one thousand eight hundred and forty-nine, before the judges of the circuit court of the United States for the southern district of New York, in the second circuit, at the city hall, in the city of New York, comes John Beardsley and Horace Beardsley, citizens of the State of Ohio, and put in their plea, Ogden Hoffman, jr., as their attorney, and brought into the said

92–93 court, before the aforesaid judges thereof, then their certain bill against Lewis Tappan, a citizen of the State of New York, being in custody, &c., of a plea of trespass on the case; which said bill follows in these words, to wit:

Circuit court of the United States for the southern district of New York, in the 2nd circuit.—Of April term, in the year 1849.

SOUTHERN DISTRICT OF NEW YORK, *ss:*

John Beardsley & Horace Beardsley, who are citizen of the State of Ohio, and merchants and copartners in trade, trading and doing business under the name, style, and firm of H. Beardsley and Company, complain of Lewis Tappan, who is a citizen of the State of New York, defendant being in custody, &c., of a plea of trespass on the [the] case.

For that whereas the said plaintiffs before and at the time of the committing the grievance by the said defendant, as hereinafter mentioned, exercised the trade and business of merchants and traders, at Norwalk, in Huron County, in the State of Ohio, to wit, at the city of New
94 York, in the southern district aforesaid, and were at the aforesaid associated together as copartners, trading and doing business under the name, stye, and firm H. Beardsley and Company, at Norwalk aforesaid, to wit, at the city and in the district aforesaid.

And whereas the said plaintiffs, in the course of their trade and business as merchants, as aforesaid, had occasion, before the committing of the several grievances by the defendants as hereinafter mentioned, and found it to their advantage to resort the [the] city of New York, for the purpose of making purchases and obtaining goods required by them in their said trade, to wit, in the southern district aforesaid.

And whereas the said plaintiffs together have always exercised and carried on, and still do exercise & carry on, the said trade & business, with integrity and punctuality of dealing, and have always been able and willing to pay their just debts, by means of which the said plaintiffs and their said mercantile house and firm had deservedly obtained the good opinion of the neighbors of the said plaintiffs & of the per-
95 sons with whom the said house and firm were in the habit of dealing, trading, and doing business, and had obtained and maintained a good credit among merchants, and the said plaintiffs and the before-mentioned house, had been and were honestly acquiring great gains and profit in their aforesaid trade and business at Norwalk aforesaid, to wit, at the city and in the district aforesaid.

Nevertheless, the said defendants, well knowing the premises, but contriving and maliciously intending to injure the good name, fame, credit, and mercantile standing and reputation of the plaintiffs and of the said firm of H. Beardsley and Company as aforesaid, and to injure the said firm in the way of their trade and business, and as such merchants and traders as aforesaid, & to prevent the said firm from obtaining the credit and goods required by them in conducting their said trade and business, and to vex, impoverish, oppress, and ruin the said firm, and to impair and injure the business, standing, & credit of the said firm of H. Beardsley & Company, and cause it to be believed that
96 the said firm could not safely be trusted, and that one of the partners thereto was not of good moral character & had put his property beyond the reach of his creditors, heretofore, to wit, on the tenth day of July, one thousand eight hundred and forty-eight, at the city of New York, in the southern district of New York, in the 2nd circuit, falsely and maliciously did compose & publish, and caused to be [to be] composed and published, of and concerning the said mercantile house and firm of said concerning them in their said trade and business and as such merchants as aforesaid, and of and concerning the plaintiffs John Beardsley, as a member and partners in the said house and firm, the following false, scandalous, malicious, and defamatory words, that

is to say: "H. Beardsley & Co., Norwalk, Huron Co., Ohio, (meaning thereby the said house and firm,) July, 1848, have been sued. Report says, Beardsley wife (meaning thereby the wife of John Beardsley, the plaintiff,) is about to apply for a divorce and alimony. Has put his property out of his hands. If so, their store will be closed soon, (meaning thereby that the store of the said house and firm would be closed soon, and meaning and intending to have it suspected & believed that the plaintiffs and the said firm were no longer worthy of credit, and that one of the partners of the said firm had put his property beyond the reach of the creditors of the said firm, and that the said firm would soon close their business and not pay their debts.)

2nd count. And also, for that whereas the said defendant farther maliciously and wickedly contriving and intending as is in the foregoing count mentioned, afterwards, to wit, on the 5th day of September, 1848, and in the city of New York, in the southern district of New York, in the 2d circuit, maliciously & wickedly republished and cause to be republished to above-mentioned defamation, words, and libel, and in addition thereto and together therewith, then and there composed and published, and caused to be composed and published, of and concerning the said mercantile house and firm, and of and concerning them in their said trade and business, and of and concerning John Beardsley as a member partner in said firm, and with the intent aforesaid, the following false, malicious, and defamatory words, that is to say, "August, 1848, confirms prior report to July, (meaning thereby that the libel and defamatory words above set forth, respecting the said house and firm were confirmed;) and say, in addition, two more suits in court of common pleas, besides those commenced by Judge Baker, (meaning thereby that two more suits had been commenced against the said house and firm.) Mrs. Beardsley petition of divorce will soon be filed, (meaning thereby the petition of the wife of John Beardsley, one of the plaintiffs and a member of said firm.) J. Beardsley, (meaning thereby the said John Beardsley,) is putting his real estate out of his hands. I (meaning thereby the defendant) do not doubt the firm (meaning the firm of H. Beardsley & Company) has the ability to do a prospeious business, so long as they are honest, which will be as long as suits their interest; (meaning and intending thereby to have it suspected and believed that the plaintiffs and the said firm of H. Beardsley and Company were no longer worthy of credit, and that the plaintiff, John Beardsley, one of the members of said firm as aforesaid, had refused to pay his debts, and had put his property beyond the reach of his creditors; and that altogether the members of said firm were able to pay their debts; they were dishonest and would not do so, unless they deemed it suited their interest.)

And that said defendant, on divers days and sundry times, between the said month of September and the time of commencing this suit, hath republished and circulated of and concerning the mercantile firm, as aforesaid, and with the intent last aforesaid, the false and defamatory words in the two last counts above mentioned, to wit, at the city of New York, in the southern district of New York, in the 2d circuit.

And by reason of the premises the plaintiffs are greatly injured, their good name, fame, and credit and reputation, and are injured in the way of their said business as merchants and traders aforesaid, & the said firm is greatly injured in the way of it said trade and business, and in it commercial standing, reputation, and credit; and the said plaintiffs and the said firm have been embarrassed in, and

prevented from, obtaining the necessary credits required by them in conducting their said trade and business, to wit, at the southern district of New York, in the 2d circuit.

And by reason of the premises, divers persons and especially one Washington Yale and Charles C. Hatch, comprising the firm of Hatch and Yale, New York, who were about to deal with the said plaintiffs, and with their said house and firm, and who, without the publication of the said libels by the defendants, would have dealt with them, and who were and have been previous to said publication in the habit of dealing with the plaintiffs, and with their said firm, in consequence of said publications of said libels, refused to deal with them, and declined to deliver the goods to the plaintiffs, which they were about to sell to plaintiffs and the said firm, to wit, at the southern district of New York, in the 2d circuit, and also, by reason of the premises, and in conse-
101 quence of the publications aforesaid, the mercantile firm of Grant & Barton, in the city of New York, refused to give a credit to the said plaintiffs, or to their said firm, by them required in their trade and business, and which, without the publication aforesaid of the libel aforesaid, they would have given to the said plaintiffs, and to their said firm, and in consequence of said publications, they, the said Grant & Barton refused to sell the said plaintiffs, or said house and firm, certain goods, which, before their knowledge of said libel, they were about to sell to the said firm of H. Beardsley and Company, and which were by the said firm required in the said trade and business, to wit, at the southern district of New York, in the 2d circuit.

And also by reason of the premises, the firm of W. T. and J. C. Hall, New York, refused to sell on credit to the said firm and to the said plaintiffs, certain other goods and merchandize whi the said firm of W. T. and J. C. Hall were about to sell to said plaintiffs and to their firm.
102 And in consequence of the publication of the libels aforesaid, the said firm of W. T. and J. C. Hall refused to have any farther dealings with the plaintiffs, to wit, at the southern district of New York in the 2d circuit.

By reason whereof the said plaintiffs have not only lost the great gains they would have acquired by dealing and trading with the said Washington Yale and Chas. C. Hatch, and with the said firm of Grant and Barton, and with the said W. T. & J. C. Hall, but also the good name, fame, credit, and character of the said plaintiffs, and their business reputation, standing, and credit as merchants and traders, and the business reputation, standing, & credit of said firm, of which they are members as aforesaid, are greatly injured and impaired by reason of the premises, to wit, at the place last mentioned. And the said plaintiffs have otherwise been greatly injured, to wit, at the city of New York, in the southern district of New York, in the 2d circuit, to the dam-
103 age of said plaintiffs of $20,000, and therefore they bring suit.

And now the said plaintiffs pray that Edward H. Owens, esq., may be substituted as their attorney in the room and stead of Ogden Hoffman, jr., esq., and thereupon, with leave of the said court, the said plaintiffs put in their place the said Edward H. Owen as their attorney in the plea aforesaid, and thereupon the said plaintiff freely, here in court, confess that the will not farther prosecute their suit against the said defendant in respect to the matters contained in the third count of their said declaration, being so much thereof as is contained in the words following, to wit:

"And the said defendant, on divers days and at sundry times, between the said month of September and the time of commencing this suit, hath

republished and circulated, and caused to be republished and circulated, of, and concerning the plaintiffs, as aforesaid, and with the intent last aforesaid the false and defamatory words in the two last counts
104 above mentioned, to wit, at the city of New York, in the southern district of New York, in the second circuit," therefore, as to the premises, above mentioned, let the defendant be acquitted and go thereof without day.

105 And the said defendant, by William Allen Butler, his attorney, comes and defends the wrong and injury, when, &c., and says he is not guilty of the said supposed grievances above laid to his charge, or any or either of them, or any part thereof, in manner and form as the said plaintiffs have above thereof complained against him, and of this he, the said defendant, puts himself upon the county, &c., and the said plaintiffs do the like, &c.

WILLIAM ALLEN BUTLER,
Deft's Att'y.

SIR: Please to take notice on the trial of this cause the defendants, under the plea of the general issue, above pleaded, will prove and give in evidence, that before the month of July, 1848, he, the said defendant, had established in the city of New York a mercantile agency, the object of which was to procure and obtain information for merchants in said who should employ him for that purpose, to be communicated in a strictly confidential manner for their own use solely, respecting merchants in the country who made their purchases in the city of New York,
106 their means, capital, and character, the length of their residence in their location, their general mode of business, as to cash or credit, their character as business men, the extent of their business, and the opinion of correspondents, based upon these and other considerations as to their responsibility and ability to pay for purchases made by them; that in the prosecution of business, and in or about the month of July, 1848, he, the said defendant, obtained information, communicated by respectable and reliable persons in the vicinity of said plaintiffs, respecting the character, habits, and conduct of the said plaintiffs, and of their said firm, and of their said business, and was, at the time aforesaid, informed by information so obtained by him, and he verily believes such obtained information to be true, that J. C. Beardsley & Co., Norwalk, Huron County, Ohio, in July, 1848, had been sued, and that report said J. Beardsley wife was about to file a bill for divorce & alimony, and that he had put his property out of his hands, and if so their store would probably be closed soon; and that in August, 1848, the said
107 defendant was informed by information so obtained by him, and he veriiy believes the obtained information to be true; that the foregoing former or prior statement or report was true, and that there were two suits in the court of common pleas besides those commenced by Judge Baker; that Mrs. Beardsley petition for divorce would soon be filed; that J. Beardsley was putting his real estate out of his hands; and that defendant informant did not doubt that the firm had the ability to do a prosperious business so long as they were honest, which would be as long as suited their interest.

That such information, as aforesaid, was entered on the private memorandum book of the said defendant, and that in the way of his aforesaid business, he, the said defendant was applied to and enquired of by merchants in the city of New York, who employed the said defendant to obtain such information, and who were trading or about to trade with the said firms, as to the character, standing, and business habits of the

said firm, and the members thereof as merchants, as to credit and integrity, and was requested to give such information as this defendant
108 had received respecting said firm and the members thereof; that in reply to said enquiries and in compliance with such request, and without malace, and in the way of his business and duty, and with intent to give correct and proper information to the aforesaid merchant who applied therefor, and who, as this defendant believed, derived such information in or to enable them to determine how far it would be safe to give credit to the said firm in the way of business; this defendant communicated in strict confidence the aforesaid information to the aforesaid merchants who had employed the defendant, and who were making enquiries, as aforesaid. That at the time of the alleged publication, in said declaration stated, the said defendant did not personally know the said plaintiffs, or either of them, and had never had any intercourse in the way of business or otherwise with said plaintiffs, or either of them, to the knowledge, recollection, and believe of the defendant. That the said defendant never composed, published, or republished the supposed libellous words contained in said declaration, except so far as the
109 said words, as hereinbefore acknowledged, and then under the circumstances mentioned.

And the said defendant will further prove and give in evidence on said trial, that it is true that J. C. Beardsley & Co., Norwalk, Huron County, Ohio, in July, 1848, had been sued, and that report did say that J. Beardsley's wife was about to file a bill for divorce & alimony, and that he had put his property out of his hands, and, if it was so, it was probable their store would be closed at once; and it is also true that in August, 1848, the report prior to July was confirmed, and it was said, in addition, that there was two more suits in the court of common pleas besides those commenced by Judge Baker, and was also true that Mrs. Beardsley pétition for divorce would soon be filed, and that J. Beardsley was putting his real estate out of his hands, and that the firm had the ability to do a prosperous business as long as they were honest, which would be as long as it suited their interest. That such was the
110 reputation of said plaintiffs and of the said firm, that the said defendant was so informed, and entered the same on his private memorandum book, and being applied to and enquired of for information respecting the said firm by merchants in the city of New York who had traded or about to trade with the said firm, as this defendant then understood and believed, and who had employed this defendant above mentioned, he, the said defendant, confidentially and privately, and without malice, permitted to be read or stated verbally to the said merchants applying and enquiring aforesaid, the substance of the statement as above set forth.

And the said defendant will further prove and give evidence on said trial, that said plaintiffs caused and procured the said defendant to publish and cause to be published the substance of the suppose libellous words in said declaration mentioned, with a view to bring an action for the same publication against the said defendant, and that through
11 certain percons, merchants in said city, or their clerks, who applied to said defendant in behalf of said plaintiffs, and by their procurement as aforesaid, and with a view to bring an action against this defendant, the said plaintiffs procured a copy or statement of the entry part of the entry made respecting the plaintiffs and their said firm in the private memorandum book of said defendant, by causing the same to be read or the substance verbally stated to such person who, in violation of confidence, furnished the same to said plaintiff, being the sub-

stance of the alleged libellous words and the publication thereof complained of in said declaration.

Dated, New York, October 10, 1850.

Your obed. serv't,

WM. ALLEN BUTLER, *Def't Att'y.*

To E. H. OWENS, Esq., *Pltf's Att'y.*

112

113 SIR: Be pleased to take notice that under the plea of the general issue pleaded by the defendant in the above-entitled cause and in addition to the matter stated in the notice to the said plea subjoined and heretofore served upon you, the said defendant will prove and give in evidence on the trial of the said cause that, before the publishing or composing of the suppose libellous words in the first count of the plaintiff's' declaration mentioned, that is to say, on or about the 1st day of July, 1848, at Norwalk, in the said county of Huron, in the said State of Ohio, they, the said plaintiffs, as partners in trade and business, had been and were suied in one or more suits or actions commenced in a court or courts, in and of the said State of Ohio, within the said State the said plaintiffs then resided, carried on their trade and business; and also the wife of the plaintiff, John Beardsley, was then and there about to apply to some court of competent jurisdiction, of and within the said State of Ohio, to obtain by the judgment or decree of said court a divorce and alimony from and against the said plaintiff,
114 John Beardsley; and also the said plaintiff, John Beardsley, had then and there put his property, or some part thereof, out of his hands in consequence of which said last-mentioned fact trere was then and there ground and reason for believing, and that it was then and there believed by divers persons to whom the said facts were known, that the store of the said plaintiff would be closed soon; and further, that the said supposed libellous words in the said first count of the said declaration mentioned, in so far as the same related to the mercantile house and firm of the said plaintiffs, or to their trade or business as merchants, or to the plaintiff, John Beardsley, as a member and partner in the said house & firm, were, at the time of the composing and publishing thereof, in all respect true.

And the said defendants will further prove and give in evidence on the said trial, that before the publishing or composing of supposed libellous words in the second count of the plaintiffs' declaration mentioned, that is to say, on or about the first day of August, 1848, at Nor-
115 walk, in the said county of Huron, and State of Ohio, two suit or actions at law, referred to in the suppose libellous words set fourth, the first count of said declaration had been and were commenced against the said plaintiffs, in a cour or courts, in and of the said State; and also a petition of the wife of the said plaintiffs, John Beardsley, were then and there about to be filed in some cour of competent jurisdiction of and within the said State of Ohio, for a divorce from him, the said John Beardsley; and also that the said plaintiffs, John Beardsley, had then and there lately put, or was then and there putting, the real estate of him, the said John Beardsley, or some part thereof, out of his hands; and also that the said plaintiff then and there had the ability to do a prosperous business so long as they were honest; and also that there was then and there ground and reason for believing, and that it was then and there generally believed that the said plaintiffs would be honest as long as it suited their interest; and further, that the said supposed libellous words

in the said second count of the said declaration mentioned,
116 "in so far" as the same related to the mercantile house and firm of the said plaintiffs, John Beardsley, as a member and partner in the said house and firm, were at the time of the composing and publishing thereof in all respects true.

Dated New York, February 25th, 1837.

WM. ALLEN BUTLER.
Def'ts Att'y.

117 Wherefore, to try the issues so as above joined, let a jury thereupon come, by whom, &c., who neither, &c., to recognize because as well, &c.

And it is ordered that the issues above joined be tried at a circuit court to be held on the first Monday of December, 1851, to which last-mentioned day & place the process continued. Afterwards, that is to say, on thaid first Monday in December, come the parties aforesaid, by their attorney aforesaid, and the jurors aforesaid being empannelled and called, also come, who being elected, tried, and sworn, do, upon their oaths aforesaid, say that the defendant is guilty of the several trespasses in the first and second counts of the said declaration laid to his charge, and they assess the damages sustained by the plaintiffs in and about the premises at ten thousand dollars, besides their costs and charges, by them, about their suit in this behalf expended, and for those costs and charges to six cents.

And the said cause is continued until the first Monday of October, 1867; and now at this day, that is to say, on the first Monday in October, 1867, to which day the said causes was continued, come the
118 parties aforesaid, by their attorneys aforesaid, and the said plaintiffs pray that Daniel D. Lord may be substituted in place of said Edward H. Owens, esq., and thereupon, by leave of the court, the said plaintiffs put in their place the said Daniel D. Lord in place of said Edward H. Owen. And on the same day a certain bill of exceptions taken and sealed on the trial of the said issues was heard, and the said court did thereupon decide that the said verdict is good and valid in the law, the said bill of exceptions to the countrary thereof in any wise notwithstanding.

And it is thereupon considered that the plaintiffs recover judgement against the said defendants, their damages aforesaid, in form aforesaid assessed, and also eleven thousand and eight hundred and sixty-two $\frac{35}{100}$, for his costs and charges of increase by the court now here adjudged to them with their assent, which damages, costs, and charges in the whole, amount to $\$21,862\frac{35}{100}$. And the said defendant in mercy, &c.

Judgement signed this day of A. D. 1867.

Judgement signed this 18th December, 1867.

R. E. STILWELL,
Dep. Clerk.

119 Supreme Court of the United States.

LEWIS TAPPAN
agst.
JOHN BEARDSLEY & HORACE BEARDSLEY. } In error.

Of December term in the year of our Lord one thousand eight hundred & sixty-eight.

Afterwards, to wit, on the first Monday of December, in this same

term, before the justices of the Supreme Court of the United States, at the Capitol in the city of Washington, comes the said Lewis Tappan, by Barney, Butler & Parsons, his attorneys, and says that, in the record and proceedings aforesaid, there is a manifest error in this, to wit, that the declaration aforesaid, and the matters therein contained, are not sufficient in law for the said John Beardsley and Horace Beardsley to have and maintain their aforesaid action thereof against the said Lewis Tappan; there is also error in this, to wit, that by the record aforesaid, it appears that the judgment aforesaid given, was given for the said John Beardsley and Horace Beardsley against the said Lewis Tappan,
120 whereas, by the law of the land, the said judgment ought to have been given for the said Lewis Tappan against the said John Beardsley and Horace Beardsley, and the said Lewis Tappan prays that the judgment aforesaid may be reversed, annulled, and altogether held for nothing, and that he may be restored to all things which he hath lost by occasion of the said judgment, &c.

BARNEY, BUTLER & PARSONS,
Attorneys for Pl'ff in Error.

(Endorsed:) Lewis Tappan vs. John Beardsley & al. Assignment of error. Barney, Butler & Parsons, att'ys for pl'ff in error.
Filed Jan'y 25, 1868.

121 Supreme Court of the United States.

JOHN BEARDSLEY & HORACE BEARDSLEY, def'ts in error, *ads.* LEWIS TAPPAN, pl'ff in error. } Joinder in error.

And hereupon afterwards, to wit, on the day and year last aforesaid, the said John Beardsley and Horace Beardsley, by Daniel D. Lord, their attorney, freely come here into court, and say that there is no error, either in the record and proceedings aforesaid, or in giving the judgment aforesaid; and they pray that the said Supreme Court, before the justices thereof, may proceed to examine as well the record and proceedings aforesaid as the matters aforesaid, above assigned for error, and that the judgment aforesaid in form aforesaid given, may be in all things affirmed.

D. D. LORD, *Att'y.*

122 (Endorsed:) U. S. Supreme Court. John Beardsley & Horace Beardsley, def'ts in error, ads. Lewis Tappan, pl'ff in error. Joinder in error. D. D. Lord, att'y for def'ts in error.
Filed Jan'y 20, 1868.

123 Circuit court of the United States of America, for the southern district of New York, in the second circuit.

LEWIS TAPPAN, plaintiffs in error, *vs.* JOHN BEARDSLEY AND HORACE BEARDSLEY, defendants in error. } Bond.

Know all men by these presents, that we, Lewis Tappan, of No. 206 DeGraw street, in the city of Brooklyn, State of New York, Robert Graham Dun, of No. Broadway, city & State of New York, and

Benjamin Douglass, of the said city and State of New York, are held and firmly bound unto the above-named John Beardsley & Horace Beardsley, in the sum of forty the thousand seven hundred and twenty-four $\frac{00}{100}$ dollars, to be paid to the said John Beardsley and Horace Beardsley, for the payment of which, well and truly to be made, we bind ourselves, and each of us, our and each of our heirs, executors, and administrators, jointly and severally, firmly by these presents. Sealed with our seals, and dated the twenty-fourth day of December, in the year of our Lord one thousand eight hundred and sixty-seven.

Whereas the above-named Lewis Tappan has prosecuted a writ of error to the Supreme Court of the United States, to reverse the judgment rendered in the above-entitled suit, by the judge of the circuit court of the United States for the southern district of New York:

Now, therefore, the condition of this obligation is such, that if the above-named Louis Tappan shall prosecute his appeal to effect, and answer all damages and costs if he fail to make his plea good, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

LEWIS TAPPAN.
ROBT. GRAHAM DUN.
BENJ. DOUGLASS.

Sealed and delivered, and taken and acknowledged, this 24 day of December, 1867, before me.

R. E. STILWELL, *U. S. Comm.*

Sealed and delivered, and taken and acknowledged, this 11th day of Jan'y, 1868, before me.

R. E. STILWELL, *U. S. Comm.*

124 UNITED STATES OF AMERICA,
Southern District of New York, ss:

Robert Graham Dun & Benjamin Douglass, being duly sworn, doth depose and say, and each for himself sath, that he resides in the city of New York; that he is worth the sum of forty-four thousand dollars, over and above all his just debts and liabilities.

ROBERT GRAHAM DUN.
BENJ. DOUGLASS.

Sworn to this 24th day of Dec'r, A. D. 1867, before me.

R. E. STILWELL, *U. S. Comm.*

I approve of the foregoing bond as to it form and execution, and the sufficiency of the sureties therein, December 27, 1867.

SAM'L BLATCHFORD, *District Judge.*

(Indorsed:) Vol. . Page . U. S. circuit court. Lewis Tappan vs. John Beardsley and others. Bond for costs on . , proctor.
Filed this 27th day of Dec'r, 1867.

125 Benjamin Douglass, being duly sworn, deposes and says:

I have real estate in the city of New York; I own the block of property on 3rd avenue, bounded by 78th & 79th streets, and Madison & 5th avenues. There is a mortgage of $20,000 on it; there are 34 lots; I believe it to be worth at least $600,000. I do not owe any debts except

mortgage on real estate, and they amount to $75,000, on property of $800,000 to $1,000,000, and there are no judgments against me.

B. DOUGLASS.

Subscribed and sworn to before me, this 11th January, 1868.

R. E. STILWELL,
U. S. Commissioner.

I approve of the sufficiency of Benjamin Douglass as a surety on the bond on writ of error hereto annexed, Jan. 11, 1868.

SAM'L BLATCHFORD, *D. J.*

126 Robert G. Dun, sworn and examined, deposes and says:

I have no real estate in New York. I am boarding at a hotel in the city of New York; I hire an office in New York. My property is pretty much all invested in my business. I have, it is safe to say, $100,000 in my business; the business is mercantile agency; it consists in debts due me. I have $25,000 invested in type in our store, and from 10 to $15,000 in furniture in different offices that I occupy in this and other cities, and have outside debts due me from solvent persons amounting to over $50,000. I do not owe any debts; there are no judgments against me. My business is not one that involves any hazard. The debts due me are principally for subscriptions in this city and in the United States. The records of my business costs me $100,000 in cash; this is additional to the amount I have before stated.

ROBT. G. DUN.

Subscribed and sworn to before me this 11th Jan'ary, 1868.

R. E. STILWELL,
U. S. Commissioner.

I approve of the sufficiency of Robert G. Dun as a surety on the bond on writ of error hereto annexed, Jan. 11, 1868.

SAM'L BLATCHFORD, *D. J.*

127 UNITED STATES OF AMERICA, *ss:*

To John Beardsley & Horace Beardsley, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington, on the first Monday of December next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the southern district of New York, wherein Lewis Tappan plaintiff in error, and you are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Salmon P. Chase, one of the judges of the Supreme Court of the United States, this 27th day of December, in the year of our Lord one thousand eight hundred and sixty-eight.

SAM'L BLATCHFORD,
Judge of the District Court of the United States for the Southern District of New York.

128 CITY & COUNTY OF NEW YORK, *ss:*

John Sheeham, being duly sworn, says that on the 28th day of December, 1867, at number 45 Exchange Place, in the city of New York, he

served the within citation on D. D. Lord, esq., proctor for the defendant in error herein. Deponent made such servise by delivering to and leaving a true copy thereof with a person in charge of said proctor's office, he being absent therefrom.

JOHN SHEEHAN.

Sworn before me, December 28, 1867.

BENJ. A. JOHNSON,
Notary Publics in N. Y. County.

(Endorsed:) U. S. Circuit Court. Lewis Tappan, pl'ff in error, vs. John Beardsley, def't in error. Citation. Barney, Butler & Parsons, pr's. for pl'ff in error.
Filed Dec. 28, 1867.

SUPREME COURT OF THE UNITED STATES.

No. 34.

LEWIS TAPPAN, PLAINTIFF IN ERROR,

vs.

JOHN BEARDSLEY AND HORACE BEARDSLEY, DEFENDANTS IN ERROR.

Brief for Plaintiff in Error.

WM. ALLEN BUTLER, } *Of Counsel for*
CH. O'CONOR, } *Plaintiff in Error.*

Evening Post Steam Presses, 41 Nassau St., cor. Liberty, N. Y.

Supreme Court

OF THE UNITED STATES.

December Term, 1870.

No. 34.

Lewis Tappan,
Plaintiff in Error,

vs.

John Beardsley and Horace Beardsley,
Defendants in Error.

Brief for Plaintiff in Error.

This case arises on a writ of error brought by Lewis Tappan, the plaintiff in error, who was defendant below, to review the judgment rendered on a verdict in favor of the defendants in error, who were the plaintiffs below. The action was in the Circuit Court for the Southern District of New York, and was for an alleged libel upon the said plaintiffs below, in their business as merchants, under the firm of H. Beardsley & Co., conducted at Norwalk, Huron county, State of Ohio. The trial was had before the Hon. Samuel R. Betts, late District Judge of said district; and the verdict was for $10,000. (*Rec.*, *fols.* 2, 89.) Exceptions taken by the defendant were

duly sealed; and on a hearing thereof in the Circuit Court were overruled. (*Rec., fol.* 118.)

The action was commenced Sept. 23, 1849. (*Rec., fol.* 91.) The trial was had Nov. 24, 1851. (*Rec., fol.* 1.) The motion for a new trial was heard Oct. 1867; and judgment was signed and entered Dec. 18, 1867. (*Rec., fol.* 118.)

The plaintiff's declaration in its first count charged the publication of a libel in the following words: "H. Beardsley & Co., Norwalk, Huron county, Ohio, (meaning thereby the said house and firm,) July, 1848, have been sued. Report says, Beardsley's wife (meaning thereby the wife of John Beardsley, the plaintiff,) is about to apply for a divorce and alimony. Has put his property out of his hands. If so, their store will be closed soon, (meaning thereby that the store of the said house and firm would be closed soon, and meaning and intending to have it suspected and believed that the plaintiffs and the said firm were no longer worthy of credit, and that one of the partners of the said firm had put his property beyond the reach of the creditors of the said firm, and that the said firm would soon close their business and not pay their debts)." (*Rec., fols.* 96, 97.)

The second count charged the publication of a libel in the following words: "August, 1848, confirms prior report to July, (meaning thereby that the libel and defamatory words above set forth, respecting the said house and firm, were confirmed); and say in addition, two more suits in Court of Common Pleas, besides those commenced by Judge Baker, (meaning thereby that two more suits had been commenced against the said house and firm). Mrs Beardsley's petition for divorce will soon be filed (meaning thereby the petition of the wife of John Beardsley, one of the plaintiffs, and a member of said firm). J. Beardsley, (meaning thereby the said John Beardsley), is putting his real estate out of his hands. I (meaning thereby the defendant) do not doubt the firm (meaning the firm of H. Beardsley & Company), has the

ability to do a prosperous business so long as they are honest, which will be as long as suits their interest (meaning and intending thereby to have it suspected and believed, that the plaintiffs and the said firm of H. Beardsley & Company were no longer worthy of credit, and that the plaintiff, John Beardsley, one of the members of said firm as aforesaid, had refused to pay his debts, and had put his property beyond the reach of his creditors, and that although the members of said firm were able to pay their debts, they were dishonest and would not do so, unless they deemed it suited their interest.)" (*Rec. fol.* 98.)

The declaration also contained an informal *continuando* of such alleged publications, which seems to have been regarded as a third count; but it was struck out by a *nolle prosequi*. (*Rec. fol.* 99, *and fols.* 103–104).

The defendant pleaded the general issue; and with his said plea, according to the New York practice, gave notice that on the trial he would give evidence that the statements published were confidential communications made in good faith in the course of his business; (as hereinafter more particularly stated), on proper occasion and without malice; that he believed them to be true; that they were so, and that "the said plaintiffs caused and procured the said defendant to publish" the same, "with the view to bring an action for the same publication against the defendant." (*Rec.*, *fols.* 105 *to* 117.

As there was no conflict of evidence at the trial concerning the principal facts, those principal and undisputed facts will be first stated.

The publications complained of were made in the City of New York, in the course of a business carried on by the defendant, called a Mercantile Agency. The object of this agency was to supply merchants who became its annual subscribers with information concerning dealers who might apply to them for credit. (*Rec. fols.* 4, 7, 8, 9.) At the times in question, and for several years previously, the defendant had carried on this business.

The defendant, by a proper tender of evidence on his part, challenged a full investigation as to the nature and usefulness of the Mercantile Agency. His counsel called as a witness *Samuel M. Beckley*, who testified that his firm did a very extensive dry goods business, selling to traders residing in perhaps two-thirds of the States, and selling on credit to merchants in various parts of the United States. (*Rec.*, *fol.* 38.)

The plaintiffs' counsel then inquired of the defendant's counsel, what was proposed to be proved by this witness; whereupon the defendant's counsel stated, that the defendant proposed to prove, by this witness and by other witnesses, who had been long engaged in, and who were familiarly acquainted with the internal trade and commerce of the city of New York; that of the goods and merchandise sold in said city to merchants and traders residing in the interior of the country, the greater part heretofore had been and still was according to the usual course of trade, sold to such country merchants and traders upon credit; that they, the said witnesses, were personally and familiarly acquainted with the nature, necessities, and interests of such trade, and with the plan, operation, and effect of mercantile agencies like that established and conducted by the defendant; and that in the opinion and judgment of said witnesses the said mercantile agencies were useful, advantageous and necessary to the convenient and successful conduct of said internal trade and commerce, to which proposed evidence the counsel for the plaintiffs then and there objected.

His Honor the presiding Judge sustained this objection on the ground that no evidence had been given on the part of the plaintiffs tending to impeach or to bring into doubt the general legality or usefulness of the business or agency established and conducted by defendant; that the only question before the court was as to the manner in which the defendant had conducted his said business in reference to the plaintiffs in the matters complained of by them; and that the proposed

evidence was, therefore, unnecessary and irrelevant. The counsel for the defendant excepted to this rejection of his evidence. (*Rec., fols.* 38, 39.)

The charge of the Court on this subject was to the same effect. It is contained in the third instruction, (*Rec., fol.* 84,) and is as follows:

"3d. That the business of the Mercantile Agency established and conducted by the defendant, was in its general purposes and features, as disclosed in the evidence, both lawful and useful, and that information, however defamatory, communicated by the defendant in good faith, and believing it to be true, to merchants applying to him for information, to guide them in their business, was in law a privileged communication, for which no action could be maintained by the party defamed by it except on proof of express malice." (*Rec. fol.* 84.)

It was, nevertheless, determined, (*Rec. fol.* 80,) that the defendant's mode of conducting the business, deprived him of any immunity under the rules of law concerning privileged communications. The employment by him of a clerk or agent to make the communication, and the employment of a clerk or agent by his merchant-subscriber to obtain or receive it, were each alike held to be incompatible with the secresy or privacy enjoined by those rules. (*See fourth instruction. Rec. fol.* 84.) This instruction raises the leading question in this case. The method of conducting the business, as it appeared in evidence, will therefore be stated before reciting this instruction at large.

The information possessed by the agency was recorded in books kept for this purpose, at the office of the agency; and from these books answers were given to inquirers. (*Rec. fol.* 3, 4, 11.)

The business of the agency appeared to be quite extensive. About twenty clerks were employed in its office. (*Rec. fol.* 15.)

Subscribers to the agency applied for information at the office, either in person or by their clerks or agents sent for that purpose; and the defendant's answers were read off from said books to the applicants, either by the defendant himself or one of his clerks. (*Rec. fol.* 3, 6.)

A merchant-subscriber's clerk thus applying for information at the agency, was required to exhibit written evidence of his authority, signed by his employer. (*Rec. fol.* 3, 6, 10, 15.)

The applicant was not permitted to see or read the entries in the minute-book of the agency. (*Rec. fol.* 6.)

Additional precautions were observed. All subscribers to the agency signed a paper. (*Rec. fol.* 6, 7, 8.) It was in the following form:

TERMS OF SUBSCRIPTION TO THE MERCANTILE AGENCY,
Established in the City of New York,
by LEWIS TAPPAN, June, 1841.

1. Those, whose annual sales of goods to persons residing in the United States and Territories, and Canada, average fifty thousand dollars or less, will severally and respectively pay fifty dollars.

2. Those, whose sales, as above, are over fifty thousand dollars, will severally and respectively pay at the rate of one dollar on every thousand dollars of their sales.

3. Half of the subscription to be paid in cash, at the time of subscription, and the other half in due bills, payable in six months, from the date of subscription.

4. At the time of subscription, subscribers to make known what the probable amount of their entire sales will be as above, and that amount will be assumed as the actual amount, subject, however, to the revision at the end of the year, when, if the actual amount shall exceed

the estimated amount, an additional sum will be paid; and if it fall short, the same shall be credited in the subscription of the following year. This does not apply, however, to subscriptions of $50.

5. Subscribers, as a general rule, to send all their claims (for the security, collection or settlement of which they may need the services of an attorney,) to the attorneys recommended at the Mercantile Agency, it being understood that their charges and fees shall be at the rates customary in the counties where they reside.

6. The information on the books of the Agency to be read at the office of the said agency to subscribers, or to such confidential clerk as may come with an order from them, subject to the regulations of said office.

7. The information furnished to subscribers, or their clerks, not to be communicated by any other person, it being furnished for the subscriber only.

8. The partner of any firm, who subscribes to this paper, to inform all his co-partners of the terms and conditions thereof, and the clerks, who obtain information, to be enjoined by the subscribers, in whose employment they may be, to observe rule 7.

9. Subscribers positively agree not to inform country traders anything learned at the office, nor to allow their clerks to do so, and they also agree not to impart the information to any one who is not a subscriber to the office.

We, the subscribers, being acquainted with the objects of the said Mercantile Agency, in consideration of the information which shall be furnished to us, at the office of the said Agency, agreeably to the regulations of the said office, do hereby agree and promise faithfully to comply with the above terms, and to pay to Lewis Tap-

pan the several sums of money which shall be due from us, according to the above terms of subscription.

The subscribers were furnished with a printed blank, in which they were required to insert the name and address of the person to be inquired about. Every application was based upon one of these papers signed by the subscriber and left at the office when the application was made. (*Rec., fol.* 10.)

This blank ran as follows:

"MERCANTILE AGENCY.

"LEWIS TAPPAN, No. 9 Exchange Place, New York.
Date of Inquiry, ——day of——1848.

About———————
Town ———————
County ———————
State———————
Subscribers' signatures———————

* Subscribers are requested to sign the above themselves, write their names at length, and fill up every blank accurately."

A blank notice was used by the Agency called a ticket of invitation. It was sent to subscribers who had previously applied for information. (*Rec., fol.* 9, 10.)

It was as follows:

"LEWIS TAPPAN'S MERCANTILE AGENCY,

MERCHANT'S EXCHANGE, No. 9 EXCHANGE PLACE.

Mr.————

No. Street.

You are requested to call at my office at your leisure, if interested, to receive information respecting

of whom you

inquired for.

P. S.—Please bring this notice."

Evidence was given tending to show that the defendant had made the alleged publications concerning the plaintiffs. Pursuant to notice and a call from the plaintiffs, the defendant produced at the trial his memorandum book. The other parts thereof being sealed up, his entries in relation to the plaintiffs were read. (*Rec. fo.* 2—*fo.* 12.) They were as follows:

"July 48.—Has been sued. Report says that J. Beardsley's Wife is abt to file a Bill for divorce and alimony, and that he has put his property out of his hands. If so, their store will proby be closed at once."

"Aug. 7, 48.—Confirms prevs Rept and says in additn two suits now in Com Pleas Court, besides those commd by Judge Baker. Mrs. B's. petitn. for a divorce will soon be filed, and I am informed Jno. B. is putting his R. E. out of his hands; I don't doubt but the firm has the ability to do a prospers bus. so long as they are hont. wh. I think will be just so long as suits their int."

Several subscribers to the defendant's agency, or clerks of such subscribers, who were examined as witnesses for the plaintiffs, testified that they applied at the office of the agency in the usual mode, and that an answer was read to them, which in substance was conformable to the alleged libel, as set forth in the declaration.

Thomas Lawrence—In July or Aug., 1848. (*Rec. fo.* 3, 5, 6.)

David L. Moore—Between 12th and 18th October, 1848. (*Rec. fo.* 11, 13 to 16.)

Morris Birch, in August or September, 1849. (*Rec., fols.* 18–19).

Samuel E. Frink, Spring of 1850. (*Rec. fol.* 25.)

Washington Yale, after 1847. (*Rec., fols.* 27–28).

The charge of the Court on the question of privilege is contained in the second and fourth instructions. (*Rec. fols.* 83, 84, 85.) These instructions were as follows:

"2d. That the words in question relating to the plaintiffs as merchants, and implying a want of credit and responsibility in the firm, and a want of integrity in its members, were actionable *per se*, and if published by defendant, or by any person acting for him by his authority, he would be responsible in damages therefor to the extent of the injury sustained by the plaintiffs as partners in their joint trade and business, unless it should appear that the words were justified by the occasion and circumstances attending their publication, or by their truth."

After stating, as before recited, that the business of the Mercantile Agency, was in itself, both law-

ful and useful, and its communications however defamatory, *prima facie* privileged. His Honor, charged.

"4thly. That the merchant to whom such information was given, being lawfully entitled to ask for and to receive it, and the defendant, if acting in good faith, being lawfully authorized to give it, there was, in the sense of the law in such a case, *no publication*, and, therefore, no ground of action; and that if the defendant in this suit had only communicated by himself personally to such of his subscribers as personally made inquiries concerning the standing and credit of the plaintiffs, the reports complained of, the case would have come within the rule of law as to privileged communications. But in this case the plaintiffs had given evidence to show that the words in question had been entered in defendant's record book by some person other than defendant himself; that they were read by Mr. Douglass, defendant's chief clerk, and by several others of his clerks, and in the hearing of such clerks; and that they were also read by Mr. Douglass, and perhaps by another clerk of defendant, to clerks of subscribers, sent by their employers to make inquiries at the agency; that all such readings to or by persons other than the defendant and the merchant actually and personally interested in obtaining information concerning the plaintiffs, were unlawful. That no person other than the merchant himself, asking for information, had in law a right to read or hear said words, and to him they could be lawfully communicated only by the defendant himself; and that the reading of said words by any person in defendant's employ with his permission, or the reading of said words by defendant himself, or by any person in his employ, to the clerk of a merchant subscriber requesting information concerning the plaintiffs, was an unlawful publication, not at all within or protected by the rule of law, as to privileged communications; and that for every such publication proved in this case, the defendant was responsible in damages to the plaintiffs, inas-

much as words were actionable in themselves, and no attempt had been made on the trial to prove them to be true."

The defendant's Counsel excepted to the fourth instruction, save the first sentence thereof. (*Rec. fol.* 87); and also requested the Court to instruct the jury in respect to the law of privileged communications, as follows:

"*First.*—That the privilege applies to communications made in this case, notwithstanding that the words in question were read by or in the hearing of the clerks employed by the defendant, provided that the jury shall be satisfied from the evidence that such clerks were necessary to the convenient transaction of the business of the defendant's agency, and were confidentially employed by him for and in the transaction of said business; and

Secondly.—That the said privilege applies, notwithstanding that the words in question were read to or in the hearing of the clerks of the merchants' subscribers to the agency of the defendant, provided the jury shall be satisfied from the evidence, that such clerks were necessary to the convenient transaction of the business of their employers, and were confidentially employed, for and in the transaction of said business."

But his Honor the Judge, refused to charge, or instruct the jury, in accordance with either of said requests, or any part thereof. And the defendant's counsel excepted to such refusal. (*Rec. fols.* 87, 88, 89.)

Other incidents at the Trial.

I.

With the view, as is supposed, to show express malice or malice *in fact*, the plaintiffs gave evidence tending to show that *Charles L. Boult*, called at the office of the Agency in July or August, 1848, "at the instance of the plaintiffs." (*Rec. fols.* 23,) "to get information of the fact, in relation to the [Agency's] report of the firm of H. Beardsley & Co." (*Rec. fol.* 22); and that he might have so called a second time near the same date. The evidence touching these interviews was given by *Boult* himself as a witness for the plaintiffs; (*Rec. fol.* 22 to 25); and by *Thomas Lawrence*, their first witness. (*Rec. fol.* 3 to 6). One of these interviews was with defendant's clerk, Douglass; the other *may have been* with the defendant himself. The utmost effect of this evidence was to show that the defendant, or his clerk did not evince a readiness to accept favorable opinions concerning the plaintiffs, expressed by their friends speaking at these interviews in their behalf.

Evidence somewhat similar was given by *Samuel Furman*, a witness for the plaintiffs, in reference to an alleged interview with Douglass, the defendants' clerk, on July 15, 1848. (*Rec. fol.* 15 to 18.)

William A. Dibble, a witness for the plaintiffs, testified, that in October, 1848, Douglass, the defendant's clerk, refused to speak *in the presence of this witness* with John Beardsley, one of the plaintiffs, in relation to the defendant's report. (*Rec. fol.* 17 to 18.)

David L. Moore, the before mentioned, witness for plaintiffs, gave like testimony as to an interview between the same plaintiff John Beardsley and defendant in November, 1848. (*Rec. fol.* 14.)

Samuel E. Frink, a witness for the plaintiffs, testified that "at the request of Mr. Beardsley," a plaintiff, he went to defendant's Agency in 1850, and had an interview with Douglass, the clerk, and suggested further inquiries concerning the truth of the Agency's report and that Douglass replied to this effect: 'What the report states is undoubtedly true and I don't think it necessary to inquire of any one." (*Rec. fol.* 26.)

The course of the trial shows that the defendant relied upon good faith and the absence of any malice in fact. He offered no evidence of the actual existence of any facts unfavorable to the plaintiffs, unless such may be found in the testimony of *Wm. E. Lee*, one of his witnesses. (*Rec. fols.* 28, 29.) After the plaintiffs had rested, the defendant gave evidence that all the plaintiffs' witnesses who had thus obtained at his Agency the said reports concerning the plaintiffs, were merchant subscribers of such Agency, except *David L. Moore*, who was clerk to a subscriber-firm. (*Rec. fol.* 39.)

By the cross-examination of said *David L. Moore*, (*Rec. fol.* 15,) and by the testimony of said Moore's employer, *William C. Hall*, (*Rec. fols.* 36, 37,) the defendant gave evidence tending to prove that said *Moore* in collusion with one of the plaintiffs called at the Agency in his employer's name and obtained its report concerning the plaintiffs by some indirect practice, without authority from his employers, and without their knowledge or consent.

William E. Lee, (*Rec., fols.* 28, 29, 30): was a witness for the defendant. He testified to a conversation with John Beardsley, one of the plaintiffs, in August or September, 1848, on the subject of the unfavorable report concerning him, made by the defendant's agency, as follows: "He (John Beardsley) never made any communication to me that he had put his property out of his hands; my impressions are that after inquiring at the office, and finding it reported that he was putting his property out of his hands, I spoke to him of

it, he denying any intention of putting his property out of his hands, so as to injure his *bona fide* creditors; and he did not acknowledge having signed any papers at all, but my impressions are, he said some papers had been prepared; that some attack had been meditated upon his property, and that he had some papers drawn up, to enable him to protect himself against some aggression, and that they never had been disclosed to any human being, and Mr. Tappan could not have known it; I don't think Beardsley told me what was the aggression against which he was guarding his property; it was a delicate affair for me to speak about to him; I think he said expressly that those papers had not been executed; I think he said they were in his own possession; I don't remember any allusion to a divorce suit, except that I made a very careful allusion about the meditated aggression; he was very guarded as to what he said about this aggression; he intimated to me that there was some unjustifiable attack to be made upon him, by which he was to be stripped of his property, and that these precautionary measures were taken to defend him against this piece of iniquity." On his *cross-examination*, this witness said: "This was in the fall of 1848; I communicated to Mr. Beardsley that I had heard this report at Mr. Tappan's, or Mr. Beardsley spoke to me about it, if I did not speak to him first: I was endeavoring to reconcile these difficulties between them: I was trying to get the thing settled; Mr. Beardsley did not appear very angry about it; I believe Mr. Beardsley had not called upon Mr Tappan at that time; I think it is very likely that I recommended him to call upon Mr. Tappan, as I said before, as I was anxious to see the matter settled; I was perfectly satisfied that Mr. Tappan had acted honestly in the matter, and that he reported only what he had heard; I was not regularly chosen as an internuncio between them; I had several conversations with Mr. Beardsley on this subject; I cannot tell when they occurred; all the conversations that were, took place in my store on two or three consecutive days, I think that communications passed between us

about his preparing to put his property out of his hands; he said it was not true; he stated, that the only thing done was, that some papers were drawn up, never executed, and finally destroyed; I don't recollect that Beardsley said anything about a farm; I don't recollect that he said how long these papers were drawn; he did not say what papers they were; they were unexecuted papers; the way I understood the matter was that he expected an unjustifiable aggression upon his property, but the thing had passed away, and the papers were destroyed; I understood it at the time to be a thing of very recent date; I think I made known to Mr. Tappan this denial of Mr. Beardsley."

The defendant then read from a commission issued by him and executed in the State of Ohio, portions of depositions made in his behalf by *Philip R. Hopkins*, *Timothy Baker*, *Amos Parks*, *John Gardiner*, *John R. Osborn* and *Cortland L. Latimer*.

This testimony tended to prove:

1st. That in July and August, 1848, it was reported in Norwalk, Ohio, that some difficulty existed between John Beardsley and his wife, and that she was about to file a bill for a divorce and alimony. (*Rec., fol.* 31 *to* 33.)

2ndly. That in July and August, 1848, it was reported in Norwalk, Ohio, that suits had been brought against H. Beardsley & Co., by Judge Baker, and that *other* suits were brought against said firm. (*Rec., fol.* 33 *to* 36.)

The plaintiffs' fourth cross-interrogatory annexed to said commission, was as follows:

"If you have testified, that as early as the first of July, 1848, or during the months of July or August, 1848, it was reported in the town of Norwalk, that the wife of John Beardsley was about to file a bill or petition against

him for a divorce and alimony, or either, please state as precisely as possible, when, where, and from whom you heard such report; and specify, distinctly, whether it was before the first of July, or during July or during August in that year, when you first heard such report? and from whom, so far as you know, did it originate? Was any man, to your knowledge, (and if so, whom,) active in circulating such report: With what accuracy or certainty can you state the time of the first circulation of such report? How do you arrive at such accuracy or certainty"? And the plaintiffs read said *Hopkins's* answer thereto, as follows:

"That in the direct examination, he stated, that he had heard there was a difficulty between John Beardsley and wife, and that she was about to file a bill of divorce, &c.; cannot name the precise time he first heard the report, nor can he state the person who first told of the difficulty, but thinks it was E. Andrews." (*Rec., fol.* 31.)

And the plaintiffs' counsel also read the answer of the witness, *Amos Parks*, to the said fourth cross-interrogatory, as follows:

"That it was in the early part of the season I first heard the report about Mrs. Beardsley filing a petition; it may have been the last of May or some time in June, in Norwalk, at Daniel Watrous' shop, and of him; he was the first person who told me. I don't know where the report originated, but Daniel Watrous was the first man who told me; don't know that any man was active in circulating such report." (*Rec., fol.* 32.)

And the plaintiffs' counsel also read the answer of the said witness, *John Gardiner*, to the said cross-interrogatory, as follows:

"I was informed of Mrs. Beardsley's intention to file a bill, first in the office of the Branch Bank, by one of the counsel she consulted, and I should say as early as July,

1848, and afterwards by Daniel Watrous, at whose house Mrs. Beardsley was staying." (*Rec., fol.* 33.)

The plaintiffs' third cross-interrogatory, annexed to said commission, was as follows:

"If, in answer to the fourth direct interrogatory, you have testified, that you knew of your own knowledge, that the said firm of H. Beardsley & Co., or either of its members were sued in or about the month of July and August, 1848; please state the amount as precisely as possible for which each suit was brought, not the nominal damages, but real amount expected to be recovered, and how you know this amount?"

The plaintiffs' counsel read the said *John R. Osborn's* answer thereto, as follows:

"I never heard what the real amount in controversy was, other than appeared from the face of the writs or summons."

In the defendant's fourth direct interrogatory, annexed to said commission, was as follows:

"Do you know whether or not the said firm of H. Beardsley & Co., or any one or more of the members of the said firm, were sued in the said month of July and and August, 1848, or in either of those months, or at or about either of those times; if yea, state your means of knowlege, and state, also, when, and by whom, and for what cause of action, and against whom in particular, and in what Court or Courts were the suits commenced; who were the attorneys in such suits, and who had the management or control of such suits respectively; did any one, commonly known by the appellation of Judge Baker, commence any such suits, and if so, in what Court, and when, and how many, and against whom in particular; set forth all your knowledge in respect to the matters enquired of in this interrogatory?" The said witness, *Osborn*, answered said questions as follows:

"My profession, as an attorney attending upon the Court of Common Pleas, of Huron County, enabled me to know that Judge Baker, either in his own name or in the firm name of 'J. W. Baker & Co.,' of which, I suppose, he was a member, had, prior to the June Term, 1848, commenced two suits against the Beardsleys, one of them in case and the other in assumpsit; in one the the damages were laid at $600, in the other, at $1,000; S. B. Stringer, according to my present recollection, was the attorney; before the commencement of these suits it was reported that John Beardsley, then in the City of New York, had caused an attachment to issue and to be levied upon the goods of Baker & Jennings as they reached the City of Buffalo; pending this attachment, J. W. Baker consulted with me in relation to his interests in that matter; I knew that it was the intention of J. W. Baker and Judge Baker, to hold Messrs. Beardsley liable for the damages which they had sustained in his proceeding, and I believe these suits were instituted for this purpose. I do not now remember whether the commencement of these suits was, at the time of their being brought, a matter of public notoriety or not; the attachment, I remember distinctly, was very much talked of as soon as it was known, and I have no doubt that the proceedings by Juge Baker were equally the subject of public discussion; I do not know that Judge Baker commenced any other suits than those above referred to."

The plaintiff's counsel proposed to read such answer of said *Osborn*.

The defendant's counsel objected in season to so much of said questions, and of the answers thereto, as related to the witness's knowledge of the suits referred to, or the commencement or nature or particulars of said suits, and insisted that evidence in respect to these matters, or to either of them, was irrelevant and inadmissible on the part of the plaintiffs. The Court overruled such, and allowed the whole of such last mentioned answer to be read, and it was accordingly read to the jury.

The defendant's counsel excepted to the decision.—(*Rec. fo.* 33 to 35.)

The plaintiffs' counsel then also read the answer of the witness *Latimer* to the same questions from the said fourth direct interrogatory, as follows:

"My means of knowledge are my presence in court as a lawyer at the calling of the dockets at the June and September terms of the Court of Common Pleas, in which these suits were brought and pending; the conversation with members of the bar and others at the dates referred to, June and September, and intermediate. The deponent never examined the records or papers in any of said suits, and cannot state who were the attorneys, nor what was the cause of action, nor what the damages.

"Deponent was never retained nor was ever interested in these suits as a lawyer, and can only state what he heard and saw incidentally."—(*Rec. fo.* 36.)

The plaintiffs' counsel then read from the return to a commission executed in their behalf in the state of Ohio, the depositions of certain witnesses, tending to prove that from their knowledge of the plaintiffs, and of the plaintiff John Beardsley's wife, they had opportunities of hearing or knowing of such reports as were spoken of by the defendant's witnesses, and that they, said witnesses for the plaintiffs, did not know or hear of any such reports until a period later than July or August, 1848.—(*Rec. fols.* 39 to 49.)

The plaintiffs' counsel was allowed to give evidence by certain witnesses for the plaintiff, that their first knowledge of such reports was hearing, in Ohio, that the defendant had circulated them in New York. This evidence was read to the jury under exceptions duly taken by the defendant.—(*Rec. fols.* 40, 41, 42, 43–53.)

II.

The fourteenth interrogatory annexed to the said commission, executed in Ohio on the part of the plaintiffs was as follows:

"14th. Were you present in Court when the first divorce suit of Mrs. Beardsley was called for trial? If so, state what occurred at that time? Did Mrs. Beardsley, or her attorney, attempt to get the cause continued? was the motion opposed, and by whom, and in whose behalf? what cause, or causes, if any, did he urge as the ground of such motion? did he or not claim that certain material witnesses named in his subpœna could not be found, and had not been served with process? were not the said witnesses, whom the attorney of Mrs. Beardsley said were absent, found to be present in attendance in the court? were or not all the witnesses named in the subpœna of Mrs. Beardsley, and all the witnesses whom her attorney claimed to be material in his argument to the court, found to be in court? was or not the attorney of Mrs. Beardsley informed by any person that all his witnesses were in court? and if so, by whom? and had any one, and if so, who, taken pains to insure their attendance? did the court allow, or refuse to allow the said motion to continue said cause? when the court refused to continue said cause, what course did Mrs. Beardsley's attorney then take in the cause? did he examine or call a witness? what reason, if any, did he assign to you, or in your hearing, for discontinuing the cause? did he then make any and what threats about commencing another suit? did he commence another suit, and when? were you present when the second divorce suit of Mrs. Beardsley was called on for trial? when was it? at what term of the court? what took place at that trial? did the attorney for Mrs. Beardsley make an effort to get the case continued? was the motion opposed, and by whom, and in whose behalf? what cause or causes were assigned in support of such motion? did the court grant or refuse such motion? was

any witness sworn or examined in behalf of Mr. Beardsley? was any, and if so, what, attempt made by Mrs. Beardsley, or by her attorney on her behalf, to prove that any of the charges contained in her said bill were true? how did the suit result, and was not a final decree rendered at that term of the court?"

The answer of *Charles B. Stickney*, a witness for the plaintiffs, to this interrogatory was as follows:

"I was in court at the time mentioned, but have not a very distinct recollection of all that past; when the suit of Mrs. Beardsley was called for hearing, S. F. Taylor, the attorney for Mrs. Beardsley, moved a continuance of the cause on the ground that some of his material witnesses were not in attendance, and could not be found; the motion was opposed by John Beardsley, and then he stated to the court, as also to Mr. Taylor, that all the witnessess named in their subpœna, and particularly those whom Mr. Taylor said were absent, were then in court; that said Beardsley said he had good reason to believe said suit was not intended to be brought to a hearing, and that at his own expense and trouble he had procured the attendance of all Mrs. Beardsley's witnesses, to prevent a continuance of said suit.

The Court then overruled motion for continuance, and said if Mr. Taylor had no other reason for continuance, he must proceed to a hearing; whereupon Mr. Taylor abandoned the suit, and it was ordered by the court to be discontinued."

The defendant's counsel objected in season to the reading of said 14th direct interrogatory, on the ground that the transactions and the things therein inquired of were wholly irrelevant and inadmissible; that they were not within the issue formed by the pleadings, nor within any matter contained in the alleged libels, nor in the notice of defendant accompanying his plea, or authorized to be given as rebutting testimony, or admissible in

evidence against the defendant in this action, and also on the further ground that the only legal and competent evidence of any proceedings in the said Court of Common Pleas, in the case inquired of by the said interrogatory, was the record of the written minutes duly verified and proved, and the said counsel also objected to the reading of the said answer to the said interrogatory as evidence against the defendant on all the said grounds; but the said several objections were overruled by the Court, and the said answer to said 14th interrogatory was allowed to be, and was read to the jury. The defendant excepted. (*Rec. fols.* 54, 55.)

The plaintiff's counsel then produced and offered to read in evidence the full record of another suit for divorce on the ground of adultery commenced by Mary Beardsley against John Beardsley on March 20th, 1849. (*Rec. fol.* 56.) It contained said John Beardsley's answer and the depositions of many witnessess for the said John Beardsley taken in that suit on notice, but generally without any appearance for the wife. One of these depositions was made by S. F. Taylor the complainant's attorney and counsel. It was apparently designed to excite a suspicion that Lewis Tappan, the defendant in this suit had procured the said divorce suit in Ohio, and was the real prosecutor. (*Rec. fols* 68, 69.) It appeared by this record that the suit was dismissed by the wife's consent in June, 1849. (*Rec. fol.* 77.)

The defendant's counsel objected to the admission of this record; and especially to the admission of any more of it than so much as might be necessary to show the nature of the suit and the time of its commencement, and further to the admission of the answer of said John Beardsley therein.

The Court overruled the objections, and allowed the whole record to be read. The defendant excepted and the said record was read to the jury accordingly. (*Rec.*

fol. 78.) This Ohio judgment record is in the record of this case. (*Rec. fol.* 56 to 77.)

III.

The counsel for the plaintiff was allowed to read the depositions of several witnesses examined in the State of Ohio, on the part of the plaintiffs, under a commission or writ of *dedimus potestatum* in this action; notwithstanding an objection by the counsel for the defendant, on the ground that the commission was improperly tested in the name of the Hon. Samuel R. Betts, District Judge of the United States, for the Southern District of New York, instead of being tested in the name of the Hon. Roger B. Taney, Chief Justice of the Supreme Court of the United States, in the manner prescribed by the Act of Congress in such case provided, and that by reason of such defect the Commissioners in the writ named had no legal authority to administer an oath to the witnesses examined before them, nor to take the said depositions. It was answered by the counsel for the plaintiffs, that such defect in the test was not material, and might be disregarded or amended *nunc pro tunc;* and, also, that the defendant by interposing the cross interrogatories annexed to said writ had waived any objection to the form of the writ; and, also, that inasmuch as it appeared by the indorsement on the said commission and depositions that the same had been opened by the consent more than four days before the commencement of the trial, it was now too late under the rules of the Circuit Court, to make the objection. The Judge sustained the answers of the plaintiffs' counsel, and thereupon overruled the objection, and decided that the said depositions might be read in evidence; to which said decision the counsel for the defendant excepted. (*Rec. fo.* 19, 20.)

The counsel for the plaintiffs then read to the jury from the return to such commission, parts of the depositions of several witnesses containing material testimony for said plaintiffs. (*Rec. fols.* 21 *to* 25—42 *to* 56.)

At each reading of a deposition or part of a deposition, taken under said commission the defendant excepted.—(*Rec. fols.* 21 *to* 25—42 *to* 56.)

IV.

After the plaintiffs had given evidence by Thomas Lawrence, that each of the alleged libels mentioned in the declaration had been published to him, the plaintiffs offered evidence of other and different publications of the same. On objection taken, the Judge decided that the plaintiffs were entitled to give evidence of any number of publications. To this decision the defendant excepted. (*Rec. fol.* 11) Evidence was given accordingly by the plaintiffs, tending to show several other publications besides those to Lawrence. Amongst these was an alleged publication to the plaintiffs' witness, *Samuel E. Frink,* in the spring of 1850. (*Rec. fol.* 25.) This was many months after the commencement of the suit. (*Rec. fol.* 96.) And in his charge, the presiding Judge instructed the jury, that "for every publication proved in this case the defendant was responsible in damages to the plaintiffs." (*Rec. fol.* 85.) The repeated publications were denominated "an aggravation of the offence and evidence of positive malice, which the jury must take into account." (*Rec., fol.* 86.)

V.

The charge was marked throughout by an unfavorable view of the defendant's case not warranted by the admissible testimony. (*Rec. fols.* 83 *to* 90.) Amongst other things it instructed the jury, that by concealing the name of his informant, the defendant took his place, and assumed the whole responsibility of the words published, and stood in no light more favorable than "the author of the slanders complained of."

(*8th Instruction, Rec. fo.* 86.)

The defendant excepted.

(*Rec. fols.* 88, 89.)

First Point.

The mode in which the defendant actually conducted the business of his mercantile agency was not such as to render unlawful the answers given by him or his clerk to the inquiries of his employers or their clerks. And the charge of the Court on this point, in the fourth instruction, as well as the refusal of the Court to modify or qualify the same in the manner suggested by the defendant's counsel, was erroneous.

(*Rec. fols,* 84, 87.)

I. It is an established canon in the law that "a communication made *bona fide* upon any subject matter in which the party communicating has an interest, or in reference to which he has a duty, is privileged, if made to a person having a corresponding interest

or duty, although it contain criminatory matter which, without this privilege, would be slanderous and actionable." And in this canon, the term *duty* is not confined to duties which are binding in law, and therefore of perfect obligation. On the contrary, it includes "moral or social duties of imperfect obligation."

Cur. per Campbell, L. Ch. J., *Harrison* v. *Bush*, 5 *Ellis & Blackburn's Q. B. Rep., p.* 348.

Van Wyck v. *Aspinwall*, 17 *N. Y. R.*, 193.

II. No extreme or impracticable nicety has marked the application of this rule Neither the exactitude of a special pleader, nor the carriage of a stoic, is required in making a privileged communication.

Dunman v. *Bigg*, 1 *Campb.* 269.

Spill v. *Maule, Law Rep.*, 4 *Exch.*, 235, *on appeal.*

Child v. *Affleck*, 9 *Barnw. & Cresw.*, 403.

"If *fairly* warranted by any reasonable occasion or exigency, and honestly made, such communications are protected for the common convenience and welfare of society; and the law has not restricted the right to make them within any narrow limits."

Per *Parke, B.*, in *Toogood* v. *Spyring*, 1 *Crompton, Meeson & Roscoe*, 193.

III. The presence of a third person, not interested in or connected with the subject matter, has not been deemed objectionable, when it was not sought or permitted wantonly, but from necessity, or even from motives of prudence or reasonable expediency.

Padmore v. *Lawrence*, 11 *Ad. & Ellis*, 380.

Griffith v. *Lewis*, 7 *Ad. & Ellis, N. S.*, *p.* 67.

Warr. v. *Jolly*, 6 *Car. & P.*, 497.

Toogood v. *Spyring*, 1 *Crompton, Meeson & Roscoe*, 181, was probably the first case in which censorious ingenuity suggested that the presence of a third person took away the privilege which would otherwise have existed. The defendant, at his own house, uttered the objectionable words *to* the plaintiff in the presence of one Taylor, a fellow-workman whom the latter had brought with him. The defendant subsequently repeated the censure in answer to a question put by Taylor. The Judge charged (p. 187), that "making the imputation on the plaintiff in the presence of another person" entitled the plaintiff to recover; and, *pari ratione*, that the defendant "was not justified in making the subsequent charge to Taylor." BARON PARKE delivered the judgment of the Court, that the statement made to Taylor was not privileged; but that the presence of Taylor on the prior occasion did not take away the privilege. On this precise point he said, at p. 194: "I am not aware that it was ever deemed essential to the protection of such a communication that it should be made to some person interested in the inquiry, *alone*, and not in the presence of a third person. If made with honesty of purpose to a party who has any interest in the inquiry (and that has been very liberally construed), the simple fact that there has been some casual by-stander cannot alter the nature of the transaction. The business of life could not be well carried on if such restraints were imposed upon this and similar communications, and if, on every occasion in which they were made, they were not protected unless strictly private." * * *

"We think the fact, that the imputation was made in Taylor's presence, does not, *of itself*, render the communication unwarranted and officious, but at most is a circumstance to be left to the consideration of the jury."

Taylor vs. *Hawkins*, 16 *Ad. & Ellis, N. S. Queen's Bench R.*, 308. The defendant dismissed the plaintiff, who was his servant, for dishonesty. Plea—Not guilty, and a justification. Little or no evidence was given in support of the latter defence (p. 312). It appeared that the defendant sent to one Thwaites, a neighboring tradesman of his acquantance, stating that he was about to discharge the plaintiff, and wished Thwaites to be present to hear what the plaintiff said. Thwaites, who was examined for the plaintiff, deposed as follows: "I visited him, and the defendant spoke to me about the unpleasant affair; he called up Taylor, and he said, 'Taylor, I have very great reason to believe that you have robbed me.'" * * *

"The learned Judge stated to the jury, as to the first issue, that the words heard by Thwaites, if considered merely as addressed by the defendant to the plaintiff, would have been justified by the occasion; but that a different question arose from their being spoken before a third person called in by the defendant. On this point he referred to Toogood *v.* Spyring, 1 Cro. M. & R., 181, † S. C., 4 Tyr., 582, [above cited] where injurious words spoken *bona fide* by the defendant to the plaintiff were held not to be divested of privilege merely because uttered in the presence of a third person." *** "And (*p.* 314) he left it to the jury to say, applying the principles there laid down, whether, under the circumstances of this case, there was such a reasonable exigency as warranted the defendant in having for the protection of his own interests, a confidential person by him at the time when he discharged the plaintiff." At 318, the plaintiffs' counsel argued, *inter al.*, as follows:

"Here the presence of a third person was not casual, nor were the words language of admonition;

they were merely expressions used in the course of a dismissal. It could not be essential for the defendant's protection to call in a third person. If no such person had been present, the plaintiff could not have proved the words. [ERLE, J.—The words which passed might be material in an action for wrongful dismissal. Lord CAMPBELL, C. J.—They were the very act of dismissal. It might be highly important to the master to preserve evidence of his having dissolved the contract, and of the reason. You do not say that a master dismissing a servant must not have any person present.] That is not contended. [Lord CAMPBELL, C. J.—Then may not he state the reason? COLERIDGE, J.—It might be important if, for instance, the servant were afterwards to bring an action for wages. ERLE, J.—The facts that he received the money tendered, and went away without desiring to have witnesses called in, might be very material. COLERIDGE, J.—If the master on such an occasion confined himself to mere words of dismissal, and afterwards, on an inquiry as to character, said that he discharged the servant for felony, the witness who was present would be obliged to say, "I heard nothing on the subject." Lord CAMPBELL, C. J.—And the observation would be that, if anything of the kind had been said, the servant might have contradicted it at the time.]

At (*p.* 319) Ld. CAMPBELL, C. J., said: "The question is here neatly raised, whether a master about to dismiss a servant may not call in a witness to hear what is said, without losing the privilege which his words would otherwise have on such an occasion." In giving judgment, at page 321, he said:

"I think the defendant did no more than a prudent and honorable man ought to have done. When he was dismissing a servant for theft, it was mate-

rial to his interest that a third person should be present who might bear witness to the dissolution of the contract, and to the reason: and it would be hard if an action lay against a master for doing in such a case, no more than he was bound to do in duty to himself and to society. As Lord *Ellenborough* said (*see Dunman v. Bigg*, 1 *Camp.* 269, *note to McDougall v. Claridge*,) the communications of business are not to be beset with actions of slander."

At p. 322. PATTESON J.—Said: "As to the first point, I think it is correctly laid down in Toogood v. Spyring 1 Cro, M. & R. 181, † S. C. 4 Tyr. 582, [above cited] that the mere presence of a third person does not take away privilege from the communication, but that it may be a circumstance from which the jury may judge whether or not the charge was made bona fide. But that is only where the third person is a mere stranger: and the question is whether such was the case here. Now Thwaites was called in as a witness to the very act of dismissing the plaintiff: that is quite different from cases in which the words have been spoken at a subsequent and distant time.

The question here is simply whether a master, dismissing a servant, may have a third person present as a witness. If indeed that third person were one unfairly chosen, an enemy of the party dismissed, a question would arise which is not raised here."

At p. 324. COLERIDGE, J.—Said: "Was the calling in a third person such a fact in the present case? On the contrary, it was one of the very things which a just and prudent man would have been most desirous of doing."

At p. 324. ERLE, J.—Said: "Communications made with a fair and reasonable purpose of protecting the interests of the party are no doubt privileged, as is laid down in Toogood v. Spyring, 1 Cro., M. & R., 181, and S. C. 4, Tyr. 582, and Somerville, *v.* Hawkins, 16 Law Times, 283. In the present case the defendant requested a confidential friend to be present when he dismissed the plaintiff. I thought that was what a prudent and honorable man would wish to do; and I left the case to the jury accordingly."

See Hancock v. *Case*, 2 *Foster & Finlason* 714; *Oddy* v. *Paulet*, 4 *Ib.*, 1010.

IV. Where the nature of the case has required it and important interests would be promoted thereby, a very considerable degree of publicity has been allowed in privileged publications.

rgee v McGregor 12 Wend 545.

Harrison v. *Bush*, 5 *Ellis & Blackburn*, 545. *The defendant and several hundred other inhabitants of the borough prepared and signed* a highly criminatory memorial to Lord Palmerston, Sec. of State, praying for the plaintiff's removal from the magistracy. The defendant pleaded not guilty and a justification. He attempted to prove the latter, but failed. (Pp. 347, 359). His acts were held to be privileged, and judgment was given in his favor.

Bradley v. *Heath*, 12 Pick, 163. The defendant uttered, concerning the plaintiff, the words, "Bradley has put in two votes."

"The defendant was one of the select men of the town, and the words were spoken in open town-meeting during an election, at which the defendant was acting in his capacity as a public officer. It was the duty of the defendant, charged with the proper conduct of the election, to give notice to the citizens there assembled, if any

one put in two votes, in order that an investigation might take place and the truth be ascertained, and that by a new ballot or otherwise, according to the circumstances, the error might be corrected.

And we think also it was a communication in which all the voters had an interest. It is not stated what the election was, but in general it may be said that every voter has an interest in the purity and correctness of the election in which he participates, and that the putting in of more votes than one, by any voter, is an illegal and wrongful usurpation of the rights of the other voters. It is therefore to be deemed a privileged communication. * * *

The instruction to the jury we think was sufficiently favorable to the plaintiff; * * the position might have been a little broader in terms, namely, that if they found that the defendant was induced by any cause to believe that the plaintiff did what the defendant said he did, and that the defendant did not speak the words maliciously, they should find for him."

Delany vs. *Jones*, 4 *Esp., N. P.* 191, was for publishing in a newspaper, an advertisement offering a reward for evidence that the plaintiff was married prior to a certain date.

Lord ELLENBOROUGH in summing up to the jury said.

At p. 193. " The plaintiff's counsel contend, that you are to take into your consideration only, whether the advertisement conveys a libellous charge against the plaintiff or not? I am of a different opinion: I conceive the law to be, that though that which is spoken or written may be injurious to the character of the party, yet if done *bona fide*, as with a view of investigating a fact, in which the party making

it is interested, it is not libellous. If therefore, this investigation was set on foot, and this advertisement published by the plaintiff's wife, either from anxiety to know, whether she was legally the wife of the plaintiff, or, whether he had another wife living when he married her? though that is done through the medium of imputing bigamy to the plaintiff, it is justifiable: but in such a case, it is necessary for the defendant who publishes the libel, to shew that he published it under such authority, and with such a view. The jury are therefore first to say, whether the advertisement imputes a charge of bigamy to the plaintiff; and if they think it does, then to inquire, whether the libel was published with a view, by the wife, of fairly finding out a fact respecting her husband, in which she was materially interested. If it was so, the publication is not a libel; and the defendant is entitled to a verdict."

The jury found a verdict for the defendant.

Gassett v. *Gilbert*, 6 *Gray* 94. A society was incorporated by statute "for the purpose of providing for the education of midwives, nurses and female physicians." The defendants its directors published, in their annual report, a caution to the public against the plaintiff, a former agent, charging her with obtaining money by untrue pretences. The Court said—"There can be no doubt that it was the duty of the defendants, as directors of the corporation, to look after its prudential and financial concerns, and to take all proper measures to see that the money raised by subscription, in aid of the institution under their charge, was collected and appropriated according to the intention of those from whom it was obtained. If they believed that the plaintiff, after her authority as such agent had ceased, was falsely representing herself as still authorized to collect subscriptions in behalf of the

corporation, and was thereby wrongfully obtaining money from the public, they were justified in publishing a notice, couched in such language as was necessary and proper to put persons on their guard against her unauthorized representations, and to prevent her from receiving money under the false pretence that it was collected for the use and benefit of the corporation. Their private interest and their duty to public alike, required that such notice should be given, if they believed the facts stated in it to be true, and acted honestly and in good faith in making the publication. To this extent we think that the occasion justified the defendants." Judgment for defendants.

As to the degree of publicity that may be allowed or of secrecy that must be observed in making privileged communications, all the reported judicial determinations hold an uniform doctrine. Liberty of speech or publication is not permitted beyond the actual exigencies of society. But within that range it is permitted in social intercourse and in all lawful business.

Parsons v. *Surgey*, 4 *Foster and Fin*, 248 *and Note.*

1. A device by associated merchants and traders to publish universally a "black list" of persons deemed unworthy of credits, was disapproved.

Goldstein v. *Foss*, 2 *Car. & P.*, 252, and same case, 6 *Barn. & Cresw.*, 154.
Gettings v. *Foss*, 3 *Car. & P.*, 160.

2. An ill-considered attempt by one of the early Mercantile Agencies in this country to make a publication similar in principle, met the same fate.

Taylor v. *Church*, 1 *E. D. Smith's N. Y. Com. Pleas R.*, 283, 284, *and same case on appeal*, 8 *N. Y. R.*, 452.

But—

3. A society of merchants and traders was formed "to concentrate and bring together, from time to time, a body of information for the exclusive use of the members relating to the mercantile credit of the trading community, with the view of diminishing the hazards to which mercantile men were exposed."

They prepared, printed and published, and circulated among their members, what was known as the "Black List." Its contents, however, were all gathered from protests, sequestrations in bankruptcy, and similar public *legal* acts, which any one, by a proper expenditure of time and money, could gain access to. Ld. COTTENHAM, delivering judgment in *Fleming* v. *Newton*, 1 *House of Lords' cases*, *p.* 379, says of the society:

"They are engaged in mercantile affairs, in which their security and success must greatly depend upon a knowledge of the pecuniary transactions and credit of others. That each of them might go or send to the office and search the Register is not disputed, and that they might communicate to each other what they had found there is equally certain. What they have done is only doing this by a common agent, and giving the information by means of printing. No doubt, if the matter be a libel, this is a publication of it, but the transaction disproves any malice, and shows a legitimate object for the act done."

In *Martin* v. *Strong*, 5 *Ad. & Ellis*, 535, The chairman of a charity meeting was held not to be privileged in his answer to the inquiries of a member touching the character of an agent *after the meeting had been adjourned.* And in *Catlin* v. *Sewell*, 3 *Wend.*, 291, a bank director was denied immunity in respect to a commuuication

touching the credit of a dealer in the bank, made to a fellow director whom he met in the street. ALDERSON, B., in *Kine* v. *Sewell*, 3 *Meeson & Welsby*, *p.* 304, commenting on the former case, said: "It is clear that a person who subscribes to a charity has no right to talk of the concerns and character of a medical man employed in the charity, and thus cause his past conduct to be the general topic of conversation, unless it be absolutely necessary to carry some particular object into effect."

This distinction is also asserted in *Catlin* v. *Sewell*, 3 *Wend.*, 294 (*supra*).

By the Court, SUTHERLAND, J.—"The defendant was not justified in speaking the words in question, on the ground that he and the witness to whom they were addressed were both directors of the same bank.

They were not spoken at the Board of Directors with a view of communicating information which might properly influence the operation of the board. A bank director would, undoubtedly, be justified in communicating to his associates any report which he might have heard in relation to the solvency or circumstances of the customers of the bank, or probably of any other person.

The legal presumption would be that his motive in making the communication was to guard the interests of the institution to which he belonged."

See Simpson v. *Downs*, 16 *Law Times*, *N. S.* 391.

Lawless v. *Anglo-Egyptian Cotton and Oil Co.*, *Law Reports*, 4 *Queen's Bench*, 262. An officer of the defendants made out and presented to the directors a statement of the plaintiffs' accounts, as manager for the Company in Egypt. The auditors added a very censorious note which did not appear to be justified by the facts. This formed part of a report which was read as usual to the

shareholders at a general meeting. Pursuant to a resolution, the report was "sent to a printer, "printed, and afterwards circulated amongst the "shareholders and used by them at an adjourned "meeting."

The case of the *Philadelphia, Wilmington and Baltimore Railroad* v. *Quigley*, 21 How., 202, was cited by counsel for the plaintiff in support of his proposition. "So here," said he, "there is a publication to the printer who had no interest in the subject matter." * * "The communication to be privileged, ought to have been made only to the shareholders who were present; the shareholders who were present had no right nor duty, by a resolution, to order an injurious statement made at a meeting, to be printed and circulated amongst the absent shareholders. The shareholders, no doubt, are interested in the prosperity of the Company, but if they want information as to its state, they must attend the meeting, and every thing that passes there and is communicated privately may be privileged; but the publication of the libellous statement to the printer destroys the privilege." MELLOR, J., in giving judgment said:

"No doubt, the directors are to make their report to a meeting of the shareholders, to be called for that purpose, and it is clear that those who are absent are bound by the acts of those who are present, but the absent shareholders are interested in the prosperity or adversity of the Company, and in knowing all the circumstances upon which the welfare of the Company depends. It seems to me, therefore, that to print the report was a necessary and reasonable mode of communicating it to all the shareholders, who must be more or less numerous. * * I think we should be going against what I may call progress, if we

were to hold that the delivery of the manuscript of the report to the printer, for the purpose of having it printed, is a publication which prevents the communication from being privileged. I also think that it was the duty of the directors to communicate the report not only to the shareholders present at the meeting, but to all the shareholders, and that they had an interest in receiving it. I am glad that Mr. Holker called our attention to the American authority, for it supports the judgment of the Court. In *Philadelphia, Wilmington and Baltimore Railroad Company* v. *Quigley* (21 Howard U. S. Sup. Court Rep., 202), it was held that it was within the course of business and employment of the President and directors for them to investigate the conduct of their officers and agents, and to report the result to the stockholders. It was also held, in the absence of malice and bad faith, that the report to the shareholders was privileged; therefore, to this extent, that case appears to me to be an express authority. But, independently of any authority, I am quite prepared to hold that a Company, having a great number of shareholders all interested in knowing how their officers conduct themselves, are justified in making a communication in a printed report, relating to the conduct of their officers, to all the shareholders, whether present or absent, if the communication be made without malice and *bona fide*. The communication in this case is *prima facie* privileged, and there being no evidence, intrinsic or extrinsic, of malice, that question was very properly not left to the jury. I think the conclusion at which the Chief Baron arrived at *Nisi Prius*, without hearing any argument erroneous, and with great deference to that eminent and learned Judge. I am of opinion this rule, to enter a non-suit, should be made absolute."

HANNEN, J., said: "I concur with my brother Mellor that the American case is directly in point, and adverse to the plaintiff's argument. The latter part of it is applicable to circumstances which do not exist here; if, after the report had served its purpose by making known to the shareholders facts which it was their interest to know, the statement had been entered in the books of the company to stand for ever a record against the plaintiff, that he had had an accusation made against him, that might have been independent evidence of malice on the part of the company."

The doctrine of this case, and of the case in this Court, cited by the English Judges, fully sustains the plaintiff in error on this point.

V. It may be that under the law concerning privileged communications a more perfect immunity from possible inconvenience should be secured to private persons in reference to matters strictly private than is accorded to those standing in a public attitude in reference to matters affecting their public relations. If this be so, retail dealers, who habitually seek credit at the principal marts of wholesale commerce, should be regarded as falling within the latter class in respect to communications concerning their responsibility and their conduct and character in matters connected therewith. When such communications are made to the wholesale dealer only, on his solicitation and by and through his agent, with direct relation to purchases on credit, actually sought by the retailer, it cannot be maintained that any principle of justice or sound policy requires them to be hedged around with prerequisites to legality that would render them impracticable or useless.

VI. The business of seeking information of the kind in question, and communicating it to the agent's employer, though not conducted gratuitously, but for hire, has been approved as "both lawful and useful" by every tribunal before which it has been arraigned, and by every judicial mind which has had occasion to examine and consider it, including the learned Judge who presided at the trial of this case (*Rec., fol.* 53,) and the eminent and experienced Justice of this Court who heard the motion for a new trial. (*See Appendix to these Points, page* 49.)

The common sentiment of the mercantile class has sustained the business; and, in consequence, it has grown up along with the rapidly expanding wealth and commerce of the country. Proper precautions and safeguards in its management are not less imperatively dictated by self-interest than by morality. The practical efficacy of those which were devised and employed is vindicated by the infrequency of complaints or law-suits. That, at most, fourteen suits for defamation have occurred in so wide-spread a business during the thirty years of its existence, only this one having attained to any success, is pregnant evidence that its action is innocuous. (*See Appendix to these Points, pages* 126 & 127.)

All the judges and private persons whose concurring opinions thus testify to the value and utility of this business, knew that by no possibility could it be conducted without the aid and co-operation of agents or employées; and the Judge who tried this cause was the first to discover in that indispensable ingredient the means of its inevitable destruction. Perhaps the refusal of a new trial has added another and a powerful voice in favor of this idea; but, if so, it is hoped that a fuller consideration will lead to its being recalled.

Washburn v. *Cook*, 3 *Denio*, 110.

1. In the infancy of English society, when this law of privileged communications must be supposed to have originated, a large portion of the people could not read, much less write. This condition was, until a recent period, extensively prevalent, even in this country. Persons of American descent and full intelligence, born, within the present century, in the city of New York, have lived to mature age, and died without acquiring a knowledge of the alphabet. Could none of these classes ever give or receive a confidential privileged communication through a messenger?

2. The progress of science and art has brought the European trader and his American correspondent within speaking distance, but, like the poor and ignorant amongst their ancestors, who happened to live apart, they cannot commune except through the agency of several sentient intermedia, each of whom must be made fully cognizant of the whole communication. Is the means of intercourse between friends and relatives, afforded by the magnetic telegraph, to be closed by judicial interdict, to all kindly and timely warnings, but left open for the uses of the plotter and the swindler?

3. In the dark ignorance of days gone by, unlettered common sense would have repelled the idea on which this judgment rests. The experience of the present enlightened age utterly forbids its acceptance.

Billings v. *Russell*, 8 *Boston Law Reports, N. S., p.* 699 (A. D. 1851), is the first reported case concerning this mercantile agency. It is printed at large in the Appendix to these Points.

Post, p. 52.

After the trial of this case in 1851, before Judge BETTS, Mr. Justice PIERREPONT, in the N. Y. Superior Court, non-suited the plaintiff in *Ormsby* v. *Douglass*, A. D. 1858. See copy of case proven on the trial, and of the arguments of counsel and opinion of the Court, in the Appendix to these Points.

Post, pages 58 *to* 123.

The non-suit was affirmed in the Court of Appeals of New York.

Ormsby v. *Douglass*, 37 *N. Y. R.*, 377.

In these cases it distinctly appeared that clerks or agents were employed in the business.

Aside from the judgment now under review, there can be found one single dictum only from which casuistry could torture a censure of the methods pursued by the defendant.

In *Phila. Wilm. and Balti. R. R. Co.* v. *Quigley*, 21 *How.*, 202, it appeared that after all requisite publicity had been given to the censorious publication of which the plaintiff complained, the directors of the corporation which was defendant, caused it to be engrossed on their books at full length. No useful purpose could have been served by this record. Here it is in evidence that the defendant entered in books the information which he gathered ; but this measure was indispensable to the business. Without something of the kind his responses could not be made with the requisite promptitude or precision. In the case cited, the record was an unnecessary act *after* the report had performed all its useful purposes. Here it was an indispensable preliminary to, or preparative for the efficient performance of the defendant's duties.

Second Point.

The admission of subsequent publications, and especially that one which was after the commencement of the suit, coupled with the instruction to give damages therefor, was error.

Ante page 25.
Philad. Wilmington and Baltimore R. R. Co. v. *Quigley*, 21 *How. U. S. R.*, 213, IN POINT.
Hemming v. *Gasson, Ellis, Blackburn & Ellis*, 346.
Beardsley v. *Bridgeman*, 17 *Iowa*, 292 *to* 294.
Pearson v. *Le Maitre*, 5 *Man. & Granger*, 720.
Barwell v. *Atkins*, 1 *Ib.*, 807.
Pearce v. *Ormsby*, 1 *Moody & Rob.*, 456.
Symmons v. *Blake*, *Ib.*, *p.* 478.

Although there was no direction in terms to award vindictive damages, the jury must have so understood the charge. This was erroneous.

Ante page 25.
See case above cited from 21 *How.*, *pp.* 213, 211.
Howard v. *Sexton*, 4 *Comst.*, 161.

Third Point.

The depositions taken on the part of the plaintiffs, (Rec., fol. 20), were improperly read in evidence; the commission under which the witnesses were examined being irregular and void, by reason of its erroneous *teste*. (*Rec. fol.* 20.) *Ante*, *p.* 24.

1st.—The first section of the Act of Congress of May

8th, 1792, (1 *U. S. Statutes at L, pages* 275, 276), expressly requires all writs and process issuing from the Circuit Court to bear *teste* of the Chief Justice of the Supreme Court of the United States.

2d.—Persons examined as witnesses under a commission duly issued in actions pending in the Courts of the United States, are indictable for false swearing. (Judicial Act of Sept. 24th, 1789, 1 U. S. Statutes, page 90, § 30; Crimes Act of April 30th, 1790, p., 116, §§ 18, 19; Act of January 24th, 1827, 4 U. S. Statutes, p. 197, §§ 1, 2); and the party against whom the witnesses are examined has the right to the benefit of this tie on the conscience of the witness.

Brown v. *Southworth*, 9 *Paige R.*, 356.

3d. In the present case, the persons by whom the depositions were taken had no legal or competent authority to administer the oath to the witnesses; and therefore no indictment for perjury could be sustained.

Hawkins' Pleas of the Crown, Ch. 69, § 4.
Rex v. *Verelist*, 3 *Camp., N. P. R.*, 432.

4th.—The irregularity of the teste was for the reasons above stated, matter of substance, and could not, under the Acts of Congress as to amendments, be disregarded or amended *nunc pro tunc*, except on the condition of having the witnesses re-sworn after the amendment.

Judicial Act of 1789, 1 *U. S. Statutes, p.* 91, § 32.

5th.—Nor did the defendant, by interposing cross-interrogatories, waive the objection. The duty and responsibility of suing out a valid writ belonged exclusively to the plaintiffs.

6th.—The right to make the objection, at the trial, was not impaired or affected, under the rules of the Circuit Court, by the opening of the Commission, by consent, on the 28th of October, 1851.

Fourth Point.

The plaintiffs' 14th direct interrogatory, and the answer of Charles B. Stickney thereto, were wholly irrelevant and inadmissible, (*fol.* 54.) *Ante, pp.* 21, 22.

1st.—The proceedings in the divorce suits when called for *trial,* and afterwards, were none of them within any issue formed by the declaration, the plea, or the notice of justification ; nor were they admissible as rebutting evidence.

2d.—The said proceedings were, all of them, between parties other than the defendant, and could not be given in evidence against him.

3d.—As to any action and orders of the Court, the only legal evidence was the record or written minutes thereof, duly verified.

Fifth Point.

The record of the second suit for divorce, in the case of Mary Beardsley against John Beards-

ley, was improperly received in evidence. (*Rec.*, *fols.* 56–77.) *Ante, pp.* 23, 24.

1st.—If this record, to which the defendant was neither a party nor privy, was admissible, for any purpose, against him, it was only so much thereof as showed the nature of the suit and the time of its commencement.

2d.—But it was wholly irrelevant and inadmissible, because, as appeared on its face, the suit mentioned therein was not commenced until the 20th of March, 1849—long after the publication of the alleged libels, on which the present action is founded. (*Rec. fol.* 56.)

3d.—The answer of John Beardsley, as appears on the face of the record, was not filed until the 8th of May, 1849, (*Rec., fol.* 58,) which was after the commencement of the present action. (*Rec., fol.* 92.)

4th.—The said answer contains various scandalous allegations against the defendant, wholly irrelevant to the suit in which it was filed, (*Rec., fols.* 60, 61,) and the reading thereof against the defendant on the trial of the present action, was in the highest degree unjust.

Sixth Point.

The Court erred in admitting evidence by witnesses in Norwalk, Ohio, of hearsay *there* concerning hearsay in New York, which imputed to the

defendant the circulation of reports in the latter place, prejudicial to the plaintiffs.

Rec. folios 41, 42, 46, 50, 53.
Ante p. 20.

Seventh Point.

The judgment should be reversed, and a new trial directed.

WM. ALLEN BUTLER,
CH. O'CONOR,
Of Counsel for Pl'tff. in Error.

Supreme Court of the United States.

DECEMBER TERM, A. D. 1870.

LEWIS TAPPAN, PLAINTIFF IN ERROR,
vs.
JOHN BEARDSLEY AND HORACE BEARDSLEY, DEF'TS IN ERROR.

No. 34.
Dec. 2, 1870.

BRIEF BY

BARTLEY & CASEY,

Of Counsel for Defendants.

No question arises in this court as to whether the communications made by Tappan to his customers in good faith, were privileged communications or otherwise. For the court below expressly ruled, in the 3d instruction to the jury, (record, p. 53) as follows:

"3. That the business of the mercantile agency established and conducted by the defendant was, in its general features and purposes, as disclosed in the evidence, both lawful and useful, and that information, however defamatory, communicated by the defendant in good faith,

and believing it to be true, to merchants applying to him for information to guide them in their business, was in law a privileged communication for which no action could be maintained by the party defamed by it, except on proof of *express malice.*"

This was certainly carrying the doctrine of privileged publications to its utmost limits in favor of the plaintiff in error.

This court designated the whole range of privileged communications, in White *vs.* Nicholls *et al.*, 3 How., 267. They are—

1. Wherever the author of the alleged slander acted in the *bona fide* discharge of a public or private duty, legal or moral, or in the prosecution of his own rights or interests.

2. Anything said or written by a master in giving the character of a servant who has been in his employment.

3. Words used in the course of a legal or judicial proceeding, however hard they may bear upon the party of whom they are used.

4. Publication made in the ordinary mode of parliamentary proceedings.

The great distinction between privileged communications and those that are not, is, that the falsity of the lat-latter are evidence of malice, while in the former it is not, but express malice must be proved. And of this the jury are to judge.

And in White *vs.* Nicholls, *supra*, the court says:

"And we think that in every case of a proceeding like those just enumerated, falsehood and the want of probable cause will amount to proof of malice."

And on page 292, the court says:

"But if the publication declared upon was to be regarded as an instance of privileged publications, malice was an indispensable characteristic which the plaintiff was bound to establish. The jury, and the jury alone, were to determine whether this malice did or did not mark the publication." And see the cases cited by Mr. Justice Daniel, in his opinion.

So here the judge charged the jury that the libel sued upon, "was in law a privileged communication for which no action could be maintained by the party defamed by it, except on proof of express malice."

In several of the States, actions for defamation upon prilvieged communications are likened to actions for malicious prosecution. The publication must not only be false, but it must be without probable cause, and these concurring are evidence of malice—and the facts are for the jury to determine.

Gray *vs.* Pentland, 2 Serg't & R., 23.
Howard *vs.* Thompson, 21 Wend., 319.
Travis *vs.* Smith, 1 Barr., 234.
Selwyn, N. P., 7th Am. ed., 1265.
Cook on Defamation, 43 Law. Lib., 38-9.
Greenl. Evidence, sec. 421.
Starkie on Slander, 55.
Pattison *vs.* Jones, 8 Barnw. & Cress., 578.
O'Donaghue *vs.* McGovern, 23 Wend. 26.
Hoar *vs.* Wood, 3 Metc., 193.
Smith *vs.* Yomans, 3 Hill, (s. c.) 8.
Bradley *vs.* Heath, 12 Pick., 163-5.
Goodenow *vs.* Tappan, 1 Ham., 60.
Phila. & W. & B. R. R. *vs.* Quigley, 21 How., 202.
Swan *vs.* Tappan, 5 Cush., 104.
Taylor *vs.* Hawkins, 16 Q. Bench, 308.
Wright *vs.* Woodgate, 2 Cr. M. & R., 573.
Townshend on Slander, §209 et. seq.

1. Point of Plaintiff in Error.

That the communication of the libel by clerks to clerks was not privileged.

None of the cases cited go the length of this case, that the libel could be written in a book, and kept exposed in a counting-room, where it was accessible to twenty clerks, and to whomsoever they would communicate it among the unnumbered clerks and partners of the houses of their subscribers.

The very principle we here insist on was established by this court in Phila., W. & B. R. Co. *vs.* Quigley, 21 How., 202. There the report made to the stockholders was privileged, but this did not extend to the preservation of the report and evidence in a book intended for distribution.

To the same effect is the publication in Taylor *vs.* Church, 1 E. D. Smith, 270, 4 Selden, 452.

Cook *vs.* Hill, 3 Sandf., 341.

Brown *vs.* Croome, 2 Starkie, Cas. 297.

In the case of Sewell *vs.* Catlen, 3 Wend., 291, it was held, that though a bank director may be privileged at a meeting of the board, he cannot speak of it to a co-director at any other time or place than at the meeting, and during the session of the board.

See also Gassett *vs.* Gilbert, 6 Gray, (Map. 94.)

Robertson *vs.* McDougal, 4 Bing., 670.

The defendant, after being warned and called upon, repeated the charges, and they were held not privileged.

Thorn *vs.* Moser, 1 Denio, 488.

Robinett *vs.* Ruby, 13 Md., 95.

Such too were the facts in the case at bar. Here the defendant below was repeatedly warned by the neighbors and acquaintances of the plaintiff, of the falsity of the charges

after which he continued to repeat them and concealed persistently the name of the informer.

In none of the cases cited has it been held that a privileged communication can be used as a shield to protect a party from malice and wantonness in assailing character, and in this light, the case was submitted by the court below to the jury on this point.

See Padmore *vs.* Lawrence, 11 Ad. & El. 380.

2D POINT.

The admission of subsequent publications.

The jury can give damages only for the libels declared upon, but subsequent reiterations of the same or similar charges may be given in evidence to show malice, or the *quo animo*.

Repetition of the slander after suit brought may be given in evidence to prove malice.

McAlmont *vs.* McClelland, 145 R. 359.
Kean *vs.* McLaughlin, 2 S. & R., 469.
See 2 Stark, Ev., p. 870.
Miller *vs.* Ken., 2 McCand., 285.

The same doctrine was maintained in Kennedy *vs.* Gifford, 19 Wend., 296.

Root *vs.* Lowndes, 6 Hill, 518.

Proof may be given of the publication of words of like import to prove express malice, or as showing the *quo animo*.

Pearson *vs.* Lemaithe, 5 Man. & Gr., 700.
Delegal *vs* Highley, 8 C. & P., 444..
Derveer *vs.* Sutphin, 5 Ohio (N. S.) 293.
Thompson *vs.* Bowers, 1 Dougl., 321.
Stearns *vs.* Cox, 17 Ohio, 590.
Howard *vs.* Sexton, 4 Conn., 159.

from the unfortunate disposition and partial insanity of the lady, and not from any fault in his conduct or character as a man.

In an action for libel or slander, the plaintiff, in order to establish the *malicious intention*, may prove the falsity of the defamatory statement, and the means which the defendant had of knowing its falsity. (Starkie on Evidence, vol. 2, 869; Rogers *vs.* Clifton, 3 B. & P., 587; 3 Eng. Com. Law R., 353.) Where the defendant attempts to justify the slander by an effort to prove the truth of the words, and fails, the plaintiff on the same principle may, in rebutting, show the utter falsity of the words, and the defendant's knowledge of their falsity.

So, also, where the defendant attempts under the general issue to prove that the charge was a matter of common or general report in the neigborhood, the plaintiff in rebutting, has a wide field open to him to prove the falsity and utter groundlessness of such reports, and that the defendant had the means of knowing that they were false and groundless.

Where a person becomes the voluntary instrument of a vile and malicious slanderer, in propagating and putting forth, in the most fatal and injurious manner, his slanders and calumnies, and yet conceals the name of the slanderer and attempts to secure protection and impunity to him, he can in a court of justice occupy no better position than the original calumniator himself.

BARTLEY & CASEY,
Att'ys for Def't in Error.

SUPREME COURT OF THE UNITED STATES.

No. 34.

LEWIS TAPPAN, PLAINTIFF IN ERROR,

vs.

JOHN BEARDSLEY AND HORACE BEARDSLEY,
DEFENDANTS IN ERROR.

APPENDIX

TO

Brief for Plaintiff in Error.

WM. ALLEN BUTLER, } *Of Counsel for*
CH. O'CONOR, } *Plaintiff in Error.*

Doan v Tappan Clerk

Appendix to the Brief of Plaintiff in Error.

A.

UNITED STATES CIRCUIT COURT,

SOUTHERN DISTRICT OF NEW YORK.

JOHN BEARDSLEY and HORACE BEARDSLEY,

vs.

LEWIS TAPPAN.

BEFORE JUDGE NELSON.

This was a motion for a new trial on a Bill of Exceptions. The case was commenced in 1849, and was for Libel and Slander, as appears in the Opinion. It was tried in November, 1851, before Judge Betts and a jury, Messrs. Cutting and Owen and Ogden Hoffman, being counsel for the plaintiffs, and B. F. Butler, for the defendant. The trial lasted over a fortnight. It resulted in a verdict of $10,000 for the plaintiffs. The defendant moved for a new trial, which motion was heard by Judge NELSON, in November, 1864. The following is his Opin ion, denying the motion:

NELSON, C. J.: This was a suit against Tappan for libel and slander of the plaintiffs, in respect to their credit as a mercantile firm, carrying on business in Norwalk, Huron County, Ohio. The defendant resided in New York, and had established in that city a Mercantile

Agency, the object of which was to procure information of the pecuniary ability and standing of merchants in the country for merchants in the city, to be communicated to the latter in a confidential manner. The defendant had some twenty clerks, who participated in the business of the establishment, and were, of course, privy to the information obtained, whether favorable or unfavorable, to the character and credit of the country merchant; and who participated in the communications of the information to their customers or customers' clerks.

The defendant communicated through his clerks to several customers, and to their clerks, facts seriously affecting the credit of the plaintiffs' house; and the main question in the case, on the merits, is, whether or not he is exempt from the consequences of the publication, on the ground of its privileged character. The Court charged the jury that if the defendant himself had communicated the information to a person applying to him for the papers in good faith, the communication might have been a privileged one; but that the publicity given to it by recording the libellous words in a book, to which others had access, and to whom they were communicated, though standing in the relation of clerks, deprived the communication of its otherwise privileged character. This is, no doubt, a very important question, and involves in its practical operation, whichever way it may be decided, interests of very great magnitude. On the one hand, to legalize these establishments in the manner and to the extent used by the defendant, is placing one portion of the mercantile community under an organized system of espionage and inquisition for the benefit of the other, exposed, from the very nature of the organization, to perversion and abuse; and, on the other, to refuse to legalize them may be restricting injuriously the right of inquiring into the character and standing of the customer asking for credit in his business transactions. We are strongly inclined to think, if the establishments are to be upheld at all, the limitation attached to them by the Court below is not unreasonable, to wit, that it

must be an individual transaction, and not an establishment conducted by an unlimited number of partners and clerks.

The principle upon which privileged communications rest, which, of themselves, would otherwise be libellous, imports confidence and secrecy between individuals ; and is inconsistent with the idea of a communication made by a society or congregation of persons, or by a private company or corporate body.

The other objections in the case are technical in their character, not involving the merits. We have looked into them, and are of opinion they are not available to the defendant. New trial denied.

For plaintiffs, Mr. DANIEL D. LORD and Mr. DANIEL LORD ; for defendant, Mr. WM. ALLEN BUTLER and Mr. O'CONOR.

B.

CASE, at *nisi prius*, before the Hon. CHARLES A. DEWEY, one of the Judges of the Supreme Court of Massachusetts, in Nov., 1855, reported in Boston Law Reporter, vol. 8, new series, p. 699. The decision was acquiesced in.

SUPREME JUDICIAL COURT of Massachussetts, } Suffolk, ss.:

HORACE BILLINGS,

v.

EDWARD RUSSELL and EDWIN F. WATERS.

Before DEWEY, J. Nov. Term, 1855.

Joinder of Defendants in an action for Slander—Mercantile Agencies—Slander—Privileged Communications.

This was a suit brought by a merchant, an extensive manufacturer and tanner of leather, in the town of Bridgton, Maine, against the proprietors of the Boston Mercantile Agency, for an alleged slander and libel, in which the damages were laid at $10,000.

The plaintiff's declaration contained two counts; the first charging the defendants with having, on the 28th of November, 1854, and at other times thereafter, publicly, falsely, and maliciously declared of the plaintiff, that he was insolvent, and in bad pecuniary credit in

business, by words spoken of the plaintiff, substantially as follows, viz: "He is largely in debt;" "he has conveyed away his property;" 'he is getting ready to fail;" "he is worse than nothing;" the second count charged the defendants with causing to be written and published, a false and malicious libel of the plaintiff, in the following words: "He is largely in debt;" "he owes a great deal;" "we think he is getting ready to fail;" "he is worse than nothing."

Upon the calling of the first witness, at the trial, to prove the slander, the counsel for the defendants objected, that an action for slander could not be maintained against two persons jointly, and that therefore no evidence could be given to sustain this count. The Court sustained the objection, and ruled that the plaintiff must discontinue against one of the defendants altogether, or must proceed upon the count for libel alone. The counsel for the plaintiff chose to discontinue the case altogether against Edward Russell, and proceeded only against Waters.

The counsel for the plaintiff then introduced evidence to show, that in the fall of 1854, the plaintiff had been refused as a receiptor by a deputy-sheriff, who had attached the stock of goods in the store of the plaintiff's brother, a merchant in same town, whom the plaintiff assisted in business, in consequence of certain reports which were current in Bridgton unfavorable to the pecuniary credit of the plaintiff; that the plaintiff was a man of large property, doing the largest business in the town, and trading largely in Boston; that his credit and standing were generally known, and regarded as good; that the unfavorable reports were said to have come from the Boston Mercantile Agency; that several merchants of Boston had called at the office of the agency, where they had heard reports read from the books of the office by the defendant's clerk, unfavorable to the credit of the plaintiff; that a friend of the plaintiff at an interview with the defendant at the Boston theatre, during the month of December, had informed him, that

he (defendant) had an unfavorable report of the plaintiff upon the books of his office which was erroneous and unjust, and should be corrected, and that thereupon the defendant replied that he was not in the habit of altering his reports; that at a subsequent interview he informed the defendant that the plaintiff felt aggrieved, but that he thought plaintiff would release defendant from all responsibility concerning the report, provided he would give up the name of his informant, which the defendant absolutely refuse to do upon the ground that it would be dishonorable. Other evidence was brought forward, showing that the defendant had been frequently requested to disclose the name of the author of the unfavorable report, but had constantly refused; and the books of the defendant were introduced, from which it appeared that the unfavorable report had been erased, and a favorable report substituted in its place.

The counsel for the defendants admitted that an unfavorable report of the plaintiff had been received and entered upon the books of the Agency, and read to the regular subscribers, who were interested in knowing the standing of the plaintiff; and offered evidence to show that the business of the Agency was conducted in a strictly confidential manner, and that the information given to their subscriber was obtained in good faith, and communicated only to persons by whom they were regularly employed in the ordinary course of business, to ascertain the credit and standing of parties with whom they were connected in business, and who were bound by agreement not to disclose the information thus obtained; and that their relations with their subscribers were entirely confidential and strictly guarded; that on the evening of the 18th of December, 1854, the defendant was informed at the Boston Theatre that the report of the Agency concerning the plaintiff was erroneous, in consequence of which information, the report was erased from the books of the Agency, and on the 20th of December a favorable report substituted in its place, previous to the suit, which was commenced on the 21st.

The counsel for the defendant argued that the plaintiff had wholly failed to establish his case, and had not even proved that the defendant spoke the words or the substance of the words charged in the count for slander, or proved that the report written in their books and published to their subscribers, was in the words alleged by the plaintiff in his count for libel ; they also claimed that if the slander and libel were both proved, still they were privileged communications, and therefore not actionable words, or a libel.

RICHARD H. DANA, Jr.,
for the Plaintiff.

HENRY F. DURANT and SAMUEL C. BURR,
for the Defendants.

Dewey, J., after briefly stating to the jury the legal distinction between slander and libel, instructed them, in substance, that unless the plaintiff had proved satisfactorily to their minds that the defendant had spoken the words substantially as charged in the first count of the plaintiff's declaration, they must find a verdict for defendant upon that count, and proceed to the consideration of the second, and if the evidence upon this part of the case failed to convince them that the defendant had caused to be written and published the precise words charged in the plaintiff's declaration, they must find for the defendants on this count also. Should it appear to them that the plaintiff had failed to sustain either of the counts contained in his declaration, he could not maintain his action, and the jury must find for the defendant.

Generally where a person makes a statement injurious to the character and standing of another, he is liable in a civil action therefor, to the party injured, provided it turns out to be false; but there are exceptions to this rule, as where a party seeking to employ a servant, makes inquiries of another respecting the servant's character, and the person so inquired of, communicates information respecting the same, confidentially and without malice, he would not be liable, though his information should prove to be

incorrect and mistaken ; so also one may make inquiries by himself or his agent, and whilst the agent in executing the trust reposed in him he is protected, because the occasion is proper and the communication is confidential. It matters not whether the agent is employed by one or more persons, the principle is the same, and though the communication be in writing, it is no publication of an actionable libel, if imparted only to those having a right to it, and who are to be benefitted by it. If a party receiving information from his authorized agent in confidence, should see fit to violate the condition of its reception, and publish it generally, then such person would appear to have overstepped the line of his duty in thus imparting it to others, and should be responsible for the injurious consequences arising from such an act, rather than the agent who had confidentially communicated the information to him.

In reference to the case before them, the jury were instructed that it was competent for the defendant to show that the words used were confidential communications made in the ordinary course of lawful business, from good motives, and for justifiable ends, and under circumstances that would constitute a defence. If the defendant, as the constituted agent of a commercial house, upon the application of his principal, made inquiries at the proper places, and under proper and reasonable guards to insure accuracy and privacy as to the information thus obtained and the information which he thus obtained was repeated *bona fide* to his employer and him alone, as the result of such inquiries, and for the purpose of governing his conduct in his business transactions with the party as to whom the inquiry was made, such communication may be justifiable as a confidential communication, and the defendant would not be responsible, although the information was incorrect and unfounded in fact, the defendant acting in good faith, and believing it to be true at the time he communicated it ; but the privilege of a confidential communication would be confined to the agent, and if the principal repeated it to others, he would be responsible therefor.

The learned Judge further instructed the jury, that the first question for them to settle was, whether the plaintiff had sustained his case at all, for if he had failed to prove the substance of the slander alleged, or that the report written on the defendant's books was the same as charged in the count for libel, then they need go no further with their inquiries; but if they found the words to have been spoken, or the libel to have been published, then they would proceed to the inquiry, whether it was a privileged communication.

The jury returned a verdict for the defendant, and in answer to an inquiry from the Court, stated that the plaintiff had not proved the slander or libel as alleged in his writ.

C.

SUPERIOR COURT

OF THE CITY OF NEW YORK.

WATERMAN L. ORMSBY,
against
BENJAMIN DOUGLASS.

This action came on for trial before Mr. Justice PIERREPONT and a Jury on the 22d day of March, 1858, at which time the plaintiff appeared by his counsel and the defendant by his counsel. The issues were raised by the following pleadings:

THE SUPERIOR COURT,

OE THE CITY OF NEW YORK.

WATERMAN L. ORMSBY,
against
BENJAMIN DOUGLAS,

Summons—For Relief.

To the Defendant;

Sir—You are hereby summoned and required to

answer the complaint in this action, which will be filed in the office of the clerk of this Court, at the City Hall, of the city of New York, and serve a copy of your answer on me at my office, No. 7 Nassau street, in the city of New York, within twenty days after the service hereof, exclusive of the day of such, and if you fail to answer the complaint as aforesaid, the plaintiff will apply to the Court for the relief demanded in the complaint.

Dated New York, September 26, 1854.

ROBERT G. PIKE,
Plaintiff's Attorney,
7 Nassau Street.

THE SUPERIOR COURT

OF THE CITY OF NEW YORK,

WALTER L. ORMSBY,
against
BENJAMIN DOUGLAS.

City and County of New York, ss.:

The plaintiff complains of the defendant, and says: that the plaintiff is, and for several years past has been engaged in the business of bank note engraving and printing and of engraving generally at the City of New York.

That the defendant on or about the first day of July last contriving and wickedly and maliciously intending to injure the plaintiff in his good name, fame and credit and to *bring* him into public scandal, infamy and disgrace with and amongst all his neighbors and other good and worthy citizens and to cause it to be suspected and believed by those neighbors and citizens that the plaintiff had been and was guilty of the offences and misconduct hereinafter mentioned to have been charged upon him by the defendant, and to vex, harass and oppress

him, the defendant, as the plaintiff has been informed and believes and so charges, did, on or about said day of July last, at the City of New York aforesaid, in a certain discourse which the *defendant* then and there had in the presenee and hearing of and with divers good and worthy citizens, falsely and maliciously speak and declare of and concerning the plaintiff, and of and concerning the plaintiff in the way of his possession and buisness of bank note engraving and printing and engraving generally, the following false and scandulous malicious and defamatory words, that is to say: He (the plaintiff meaning) "is a man of no credit and responsibility;" "he" (the plaintiff meaning) "is a man of no character;" "he" the (plaintiff meaning) "is a counterfeiter;" "he" the plaintiff meaning) "works for counterfeiters;" "he" (the plaintiff meaning) "has been a counterfeiter;" "he" (the plaintiff meaning) "has worked for counterfeiters."

By reason of the speaking of which said false, scandulous and malicious words the plaintiff is greatly injured in his good name, fame, credit and repuation as an indivudal and man of business to his damage ten thousand dollars, for which amount he prays judgment with costs.

ROBERT G. PIKE,
Plaintiff's Attorney.

City and County of New York, ss:

Waterman L. Ormsby, the plaintiff herein being duly sworn, saith, that the foregoing complaint is true of his own knowledge, except as to the *matters* stated on information and belief, and as to those matters he believes the same to be true.

W. L. ORMSBY.

Sworn to before me, this 24th day of November, 1854,

C. C. PINCKNEY,
Commr. of Deeds.

IN THE SUPERIOR COURT

OF THE CITY OF NEW YORK.

WATERMAN L. ORMSBY.

against

BENJAMIN DOUGLASS.

THE ANSWER of Benjamin Douglass, defendant, to the Complaint of Waterman L. Ormsby, the plaintiff, in this action:

First.—Except only as to the fact that the said plaintiff is, and for several years past has been, engaged in the business of engraving, generally in the city of New York, the defendant denies the allegations of the said complaint, and each and every of the said allegations.

Second.—And for a further and separate defence, the defendant says, that before and at the time of the alleged grievances in the said complaint mentioned, the defendant was employed by divers merchants and dealers to procure and preserve, and when needed for the purpose of guiding discretion in their busiuess transactions, to communicate confidentialy to them, such merchants and traders respectively, and their respective agents in that behalf, information as to the property and *personal*, and business, character, credit, conduct and trustworthiness of persons transacting business in the United States, or in the British American Provinces. And that in the course of such employment, acting in good faith for the benefit for those who had so employed, or thereafter might employ him in such agency, the defendant acquired certain information touching the said plaintiff in the respects aforesaid, which he, the defendant, then and from thence to the commencement of this action believed to be true.

And the defendant further alleges, that any words

spoken or declared of, or concerning the said plaintiff and in *the* said complaint mentioned, were so spoken and declared in a communication of such information acquired as aforesaid, confidentially made by the defendant in the course of his said employment to the said good and worthy persons in the said complaint mentioned, who then and there were such his employers in that behalf, as aforesaid, or the agents of such employers, and who then and there applied for and actually needed such information for their guidance as aforesaid, which communication was so made by the said defendant, in due performance of his duty in such employment as aforesaid, in good *faith* in the full belief that the same was in all respects true and without any malice or intent to injure the said plaintiff, but for the sole purpose of enabling the said good and worthy persons or their principals, to determine whether or not it was prudent to deal with and give credit to the said plaintiff.

Third.—And for a further and separate defence to the said action, made on information and belief, the said defendant saith, that during all the time during which the said plaintiff alleges in the said complaint that he was engaged in the *business* of bank-note engraver and printer, he, the said plaintiff, gave out and published that he was engaged in such business. And the defendant further saith, that the said business unless conducted with the precautions hereinafter mentioned, was liable to be and to become an instrument of great fraud and injustice, by enabling evil disposed persons to make counterfeit resemblances of trade-marks and bank-notes by which they could deceive purchasers of goods and dealers, to whom such evil disposed persons might tender such counterfeit resemblances of bank bills as payment or in exchange for gold coin, *or* good bank bills. And the defendant saith, that during all said time, all engravers of bank-notes and trade marks, or either who pursued such

business in a lawful and proper manner, and who conducted their said business honestly, and faithfully governed themselves therein by the following precautions (among others,) that is to say, They did not and would not make or engrave plates suitable for the purposes aforesaid, except for persons well of known and respectable character, and who would readily be found and resorted to in case impressions taken from such plates should be used as counterfeits, and *except* in cases and to the extent rendered necessary by some law or usage of paramount obligation, such engravers retained in their own possession the plates so made or engraved by them, and this prevented any use thereof otherwise than under their own immediate supervision, whereby they were enabled to confine and did confine the use of such plates within the limits required by fair dealing and the law of the land.

And the said defendant saith, that during all the said time, and before the committing of the said alleged grievances in said complaint mentioned, the said defendent in his said alleged business was in the habit of engraving, in whole or in part as required by any casual applicant to him, without any knowledge or inquiry of or concerning such applicant, or of or concerning his intent or object, plates adapted to the purpose of making paper, having the form and similitude of bank-notes and trade marks. And the defendant further saith, that the plaintiff, well knowing the premises during all the time aforesaid, in disregard of the mischievous consequences to be apprehended as aforesaid, and for mere gain and lucre did (amongst other instances) engrave in whole or in part for persons to him then, and to the defendant in this action now unknown, plates as last aforesaid, impressions from which were afterwards, by such last mentioned persons or their confederates, used and put into circulation fraudulently, that is to say, plates for printing the similitude of bank bills, each purporting to be issued by a supposed bank called the Mousam River Bank,

located at Sandford, in the State of Maine, by which the similitude of bank bills in large numbers, dated August 30, 1854, were made, passed off, and fraudulently put in circulation by persons to the defendant unknown, purporting to be for two dollars, three dollars, five dollars, and ten dollars respectively, also plates adapted in whole or in part for making the similitude of bank bills, from which were made and put in circulation fraudulently by some person or persons to the defendant unknown, false and forged bank bills purporting to be of the denominations and issued by the banks following, that is to say, counterfeit three dollar bills purporting to be of the City Bank of New Haven, in the State of Connecticut; counterfeit three dollar bills purporting to be of the Merchants' Bank of Salem, in the State of Massachusetts; counterfeit two dollar bills purporting to be issued by the Mechanics' Exchange Company, of New York, in the form of checks two dollars each on the Bank of St. Albans, in the State of Vermont, payable to bearer on demand; counterfeit ten dollar bills purporting to be of the Farmers' Bank of Schuylkill, located at Schuyler-haven, in the State of Pennsylvania; counterfeit one dollar bills purporting to be of the Delaware City Bank, located at Delaware in the State of Delaware; counterfit two *dollar* bills purporting to be of the North River Bank, located in the city of New York; and did also in like manner engrave a plate adapted to making counterfeit labels or trade marks, by which the venders of spurious and inferior medicines were enable to place thereon a similitude of the trade mark of Moffatt's vegetable Life Pills, sold by William B. Moffatt at the city of New York, and bearing a *fac simile* of John Moffatt's signature, he, the said plaintiff, well knowing at the time he so engraved said last mentioned plate the purpose and object for which the same was obtained; and did also in like manner engrave two copper plates as follows; one copper plate with the words "ten dollars" engraven thereon; one other copper plate

with the words Boston, "State of New York," "New Jersey," fifty dollars, and Massachusetts engraven thereon; one steel plate having engraven thereon a medallion enclosed the figures "10," and another medallion enclosed the shield bearing the figures "50;" one other steel plate having engraven in distinct, well-separated lines, the following names of banks, to wit, "The Manufacturers' and Mechanics' Bank," "Merchants' Bank," "Bank of North America," "Bank of Commerce;" another steel plate having engraven thereon the following matters, to wit, on the upper part of the left end a medallion enclosed the figure "3," on the lower part of the same end a large medallion enclosing a helmeted head, on the upper part of the right end medallion similar to the first, also enclosing the figure "3," on the lower part of the same end, a larger medallion enclosing a head and a bust of a man believed to be Harrison; on its upper portion, between said ends, the letter "A," a *female*, angelic figure, bearing a shield which is also supported by an eagle with arrows in his claws, the letters "No.," and a medallion enclosing the figure "3," and beneath, after an interval or blank space left for inserting the name of the bank the words "will pay three dollars on demand to the bearer.

"Cashr." "Prest."

and also another steel plate having engraved thereon the following matters, to wit, at the left end an oblong, square, ornamental vertical band, enclosing the word "two;" on the left end, both at top and bottom, a small similar horizontal band, each enclosing the *same* word, with a medallion between enclosing a helmeted head; at the top, between said ends, a large ornamental female figure accompanied by various insignia, the letters "No.," a medallion enclosing the figure "2" and the letter "A" and beneath, after an interval or blank space left for inserting the name of a bank, the words "will pay two dollars on demand to the bearer.

"Cashr." "Prest."

which last mentioned six plates were engraved by the said plaintiff at one time, and for a person to the defendant unknown, who obtained the same from the said plaintiff for the purpose of making counterfeit bank bills therefrom for fraudulent purposes, as the said plaintiff well knew when he so engraved the same. And in 1841, the said defendant engraved and delivered to Edwin Ely a plate containing all the important parts requiring for their formation artistic skill in the engravers, which was shortly thereafter, by said Ely or his associates, used to make counterfeit similitudes of the bank notes of the Bank of Orwell, in the State of Vermont, which were fraudulently put in circulation to a very great extent.

And the defendant further saith, that long *prior* to the said alleged grievances, and on or about the first of January, in the year one thousand eight hundred and forty-eight, it was stated and represented to the said plaintiff that his said habits and practice of placing in the hands of persons not known to him to have lawful and just occasion to use them, engraved plates, or part of plates, capable of being used for the purpose of making counterfeits, was immoral and improper; whereupon he, the said plaintiff, replied that no man had a right to inquire for whom he worked, that it was *not* his place or duty to inquire into the object of his employers, or the uses to which they intended to apply his work after it had passed out of his hands, and that it had been his practice to work, and that he intended for the future to work in his said business for any person who would employ and pay him, without regard to their characters or purposes in possessing themselves of his work.

Fourth.—And for a separate and distinct answer to the action of the said plaintiff, by the way of mitigation, and to reduce any *damages* which may be recoverable against him, the said defendant, states the several facts above set forth in the second branch of this

answer, and also that he was informed of and verily believed, and still believes in the several facts above set forth in the third branch of this answer; and that in speaking and declaring any words concerning the said plaintiff, complained of in this action, he, the defendant was acting in manner and under the circumstances in the second branch of this answer alleged, and was thereto induced by such information as in this answer mentioned, *and* by his said belief in the truth thereof.

FULLERTON & DUNNING,
Attys. for Deft.

City and County of New York, ss.:

Benjamin Douglass, being duly sworn, deposes and says, that he is the defendant in the above entitled action, that he has read the foregoing answer, and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters therein stated on information and belief, and as to those matters he believes it to be true.

BENJAMIN DOUGLASS.

Sworn before me, this 14th day of March, 1856,

E. A. STANSBURY,
Commr. of Deeds.

The counsel for the plaintiff, to maintain the issues on his part, called as a witness—

Buckley T. Benton, who, being duly sworn, testified as follows:

Q. Where do you reside?
A. I reside in Brooklyn.
Q. Where is your place of business?
A. No. 169 Broadway.
Q. In this City?
A. Yes.
Q. What is your business?
A. Gold-pen maker—jeweller.

Q. Do you know the plaintiff?

A. Yes.

Q. How long have you known him?

A. I think I have known him some twelve years.

Q. *Do* you also know the defendant, Mr. Benjamin Douglass?

A. Yes, sir.

Q. How long have you known him?

A. I could not say the exact time; about four or five years.

Q. In July, 1854, did you have any conversation with Mr. Douglass, concerning Mr. Ormsby?

A. I think I did in July or August.

Q. Where did you have that conversation?

A. At his office.

Q. Where was his office?

A. No. 111 Broadway, Trinity Building.

Q. I suppose you called there upon business?

A. Yes, sir.

Q. Just *relate* what occurred at Mr. Douglass' place from the time you went in until you left.

A. I think it was in July I made an application for information, in relation to a note, which I had from Mr. Ormsby, endorsed by Mr. Ormsby.

Q. (By defendant's counsel:) Tell what you said to Mr. Douglass.

(By plaintiff's counsel:) There are two or three preliminaries I desire to get, before introducing the conversation?

A. I did not enquire about Mr. Ormsby at that time.

Q. I am not speaking of any time in which Ormsby's name was *mentioned;* I am speaking of the time when Douglass first spoke to you concerning Ormsby.

A. I think that must have been some time in the last of July, or the forepart of August.

Q. I understand you to say you went to his place?

A. Yes, sir.

Q. Will you please state to us what there occurred? did you see Mr. Douglass?

A. Yes, sir.

Q. Did you say anything to him, and did he say anything to you?

A. I said I came in for information, in relation to Mr. Ormsby. I made an application and presented it at the *counter*. one of the clerks came and turned to a book.

Q. Then what next took place?

A. He looked at the book, turned round and beckoned to another clerk, and he came.

Q. And what next took place?

A. He looked at the book, and then turned to Mr. Douglass himself.

Q. Mr. Douglass, the defendant?

A. Yes, sir.

Q. What occurred then? what was said and done?

A. He said that he could not give me a report of Mr. Ormsby in writing.

Q. (By the Court:) Who said that?

A. Mr. Douglass.

Q, (*By* plaintiff's counsel:) Did he assign any reason why he could not?

A. Yes; he said the report was very bad.

Q. What was said next either by yourself or him?

A. I told him I was somewhat surprised that there should be a bad report of him, as I had known Mr Ormsby very favorably, during the time that I have been accquainted with him; I also told him that I thought he must be mistaken.

Q. Did he make any reply to that?

A. That conversation might have taken place immediately after he repeated other words; I *cannot* say whether it was said before or after.

Q. What were those words to which you now allude? Give us those words as Mr. Douglass uttered them; imagine yourself to be in his place and speaking to us as he spoke to you.

A. I would rather not repeat the words, for it is against myself in doing so.

Q. We cannot help that; I beg your pardon, but we must insist upon having them?

A. Mr. Douglass said that Mr. Ormsby was a bad

man: a man of no responsibility, and advised me not to have anything *to* do with him.

Q. What else did he say, if anything?

A. He said he was a bad man, and worked for counterfeiters, and was a counterfeiter.

Q. Was it before or after he said that Ormsby was a counterfeiter that he advised you to have nothing to do with him?

A. I could not say.

Q. Tell us whether he gave you that advice more than once during that conversation?

A. I could not say, sir.

Q. How long were you engaged in conversation with Douglass?

A. Probably not more than four or five minutes; it might have *been* ten, but I should think it was four or five minutes.

Q. Did you, before or after this time, hear Mr. Douglass say anything about Mr. Ormsby?

(The defendant's counsel objected, as there was no other charge against the defendant but in reference to one conversation.)

(The Court desired the authorities to be sent for, and reserved its decision.)

Examination resumed:

Q. Did you say you have known Ormsby about twelve years?

A. Yes.

Q. In what business has he been engaged during those twelve years, so far as he has had any?

A. Bank *note* engraver.

Q. Where was his place of business when you first became acquainted with him?

A. I think it was 116 Fulton street.

Q. And at the time of the speaking of these words, where was his place of business?

A. I think it was in Vesey Street, I will not be sure.

Q. At the time of the speaking of these words do you know whether he was largely engaged in the business of a bank note engraver?

A. I could not say whether he was very largely en-

gaged in the bank note engraving *business*; he did considerable work for banks; I know he was doing a good business at the time I came to New York.

Q. Do you know whether his credit was good at that time?

(Objected to. Question withdrawn.)

(The authorities above referred to having arrived, the cases were read to the Court by the learned counsel for the plaintiff, and the objection of the defendant's counsel to the question overruled; to which the defendant's counsel took exception.)

Examination resumed:

Q. I will ask you if upon any other occasion Mr. Douglass had a conversation with you concerning Mr. *Ormsby?*

A. I think on one occasion.

Q. Was it before or after the one already spoken of by you?

A, It was after.

Q. How long after?

A. I cannot say, sir.

Q. About how long?

A. It might have been one or two months after.

Q. Was it before the commencement of this suit?

A. I think it was; I think it was about the time of the commencement of this suit.

Q. Were you waited upon by Mr. Pike, the attorney for the plaintiff, in reference to the speaking of these words?

A. No, sir, I was *not*.

Q. Did anybody call upon you?

A. No, sir, not in relation to this matter.

Q. Can you be a little more definite as to the time? the first conversation, you say, was in the latter part of July or the fore part of August?

A. I think the conversation was within two weeks, but it was within two months certain.

Q. You say you think it was within two weeks?

A. I think it was within two weeks; I am sure it was within two months.

Q. Is there any fact or circumstance by which you can *determine* whether it was within two weeks or not?

A. I do not think I could.

Cross-examined by defendant's counsel:

Q. Have you any memorandum of the date of this conversation with Mr. Douglass? Did you make any?

A. No, sir, I did not.

Q. You say it was late in July or early in August?

A. Yes, sir.

Q. You are not certain which month it was in?

A, I am not positive; no, sir.

Q. Suppose it was in August—can you say, with any certainty whether it was early or late?

A. I think I could; *it* was early in August.

Q. By "early," you mean before what date? Do you mean before the 15th, 10th, or 5th—or how?

A. I should think it was before the 15th, but I cannot say positively; I have no memorandum.

Q. You think it was before the 15th, but you cannot say for certain?

A. Yes, it was in July or August.

Q. And if in August, before the 15th?

A. I should think so.

Q. Of that you are not positively certain?

A. No, sir.

Q. You called at No. 111 Broadway, Trinity Buildings, at the office of Mr. Douglass?

A. I think he was there at that time.

Q. Whatever house it was, it was at the office of Mr. Douglass?

A. Yes, sir.

Q. What was that office or place at which you called? Had it a sign up which indicated what it was? Was it a bank, or insurance company, or dry goods store, or what? I want to know what office it was.

A. His Mercantile Agency office.

Q. It was at an office at which he was carrying on the business called "Mercantile Agency?"

A. *Yes*, sir.

Q. Where was your place of busines at that time?

A. I cannot say whether it was in Broadway or Maiden Lane.

Q. You there carried on the same business that you have named?

A. Yes.

Q. You manufactured and sold gold pens, and some other kinds of jewelry—fancy goods of that description?

A. Yes.

Q. You were a merchant and trader, in a word, in the City of New York?

A. Yes, sir.

Q. Had you been what is called a subscriber to that mercantile agency for some time?

A. Yes, sir, I think for a *year;* I might have been for longer time.

Q. Have you not been a subscriber from the time it was carried on by Messrs. Tappan & Douglass?

A. I might have been; I could not say whether it was one or two years.

Q. Was that (handing paper) the contract made between you and that concern when you became a subscriber?

A. That is the one.

Q. You became a subscriber under that agreement which you signed at the time?

A. Yes, sir.

(Counsel for plaintiff objected to the introduction of this document. Objection overruled, and exception taken.

Counsel for defendant read and put in evidence the contract, which was marked Exhibit No. 1.:

Exhibit No. 1.

"TERMS OF SUBSCRIPTION

"To the Mercantile Agency of TAPPAN & DOUGLASS, established June, 1841.

"1. Those whose annual credit sales (except to the trade of New York and Kings Counties, N. Y.) amount to fifty thousand dollars or less, shall severally and respectively pay *fifty dollars* for country information only, and those whose annual credit sales to the trade of New York and Kings Counties, N. Y., exclusively, amount to fifty thousand dollars or less, shall pay a like *sum of fifty dollars* for city information only.

"2. Those whose credit sales in all amount to fifty thousand dollars or less, shall pay *seventy-five dollars* for both city and country information.

"3. Those whose credit sales, as above, are over fifty thousand dollars, shall pay at the rate of *one dollar additional on every thousand dollars addttional of their* said sales.

"4. The subscriptions considered as due in cash at the time of subscription, at which time subscribers are to make known what the probable amount of their entire credit sales will be as above; and *that* will be assumed as the actual amount, subject, however, to the revision at the end of the year, when, if the actual shall exceed the estimated amount, an additional sum will be paid; and if it fall short, the same shall be accredited in the subscription of the following year. This does not apply, however, to minimum subscriptions, as set forth in Rules 1 and 2.

"5th. Subscribers agree, as a general rule, to send all all their claims, (for the security, collection, or settlement of which they may need the services of an attorney,) to the attorneys, reccomended *at* the agency; it

being understood that their charges and fees shall be at the rates customary in the counties where they reside; and that particular pains are taken to select the *best attorneys*.

"6. The information on the books of the agency is considered strictly *confidential*, and will be read at the office of said agency to subscribers, or to such confidential clerk, as may come with an order from them, subject to the regulations of said office.

"7. The information furnished to subscribers, or their clerks, *not to be communicated* to any other persons, it being furnished for the use *of* the subscribers only. Reliance is placed on the integrity of subscribers that this rule shall be honorably observed. In case of wilful violation, the subscription to be considered forfeited.

"8. The partner of any firm who subscribes this paper, to inform all his copartners of the terms and conditions thereof, and the clerks who obtain information, to be enjoined by the subscribers, in whose employment they may be, to observe Rule 7.

"9. Subscribers positively agree not to inform country traders of anything learned at the office, nor to allow their clerks to do so. And they also *agree not to impart the information to any one who is not a subscriber to the office.*

"The *undersigned* being acquainted with the objects of the said Mercantile Agency, in consideration of the information which shall be furnished to him at the office of said agency, agreeably to the above conditions, and the regulations of said office, do hereby agree and promise faithfully to comply with the above terms, and to pay to Tappan & Douglass, the several sums of money which shall be due by him according to the above terms of subscription.

"Credit sales estimated at country.... $
" " " " *city*..... $

Based on..... $75,000

"New York, 7th day of November, 1853.

(Signed)

"B. T. BENTON,
33 Maiden Lane,
New York.

"Settle about the first January, 1854."

Q. Under that arrangement you continued a subscriber to the agency down to the time when this conversation took place?

A. I could not say whether I was a subscriber at the time the conversation took place or not.

Q. Why not?

A. I have no memorandum of the fact; if I have signed the contract, so, it is so; *I* have no other method of knowing.

Q. There is the contract, and from that time forward you made such use of the agency as you saw fit.

A. Yes.

Q. At the time of this interview, in August, of which you have spoken, you say you applied for information in relation to Mr. Ormsby, and you went to the counter and presented an application,—did you present that application orally or in writing?

A. I think I presented it in writing.

Q. Was it a small printed form you used, or had you written it all yourself?

A. *I* think it was a small printed form.

Q. Was it like that? (handing document.)

A. I should think it was.

Q. Filled up, however?

A. Yes.

Q. How was it filled up; you filled it up *there*, I suppose, (pointing) opposite *that*—the name of the person, and then the nature of his business?

A. I suppose I did.

Q. Town, county, State, place where he lived, and then put your name to it?

A. I should think I did.

The learned counsel then read and put in evidence the document alluded to, which was marked Exhibit No. 2:

Exhibit No. 2.

MERCANTILE AGENCY.

B. DOUGLASS & Co.: Trinity Building, Broadway
New York, 18 ,

Give us in confidence, and for our exclusive use and benefit in our business, whatever information you have respecting the standing, responsibility, &c., of

Name.....
Business.....
Town.....
County.....
State .....
.....Subscriber.

☞ Subscribers to sign the above themselves. No...

Q. How long have you known Mr. Douglass; I think you said three or four years?

A. It is *four* years certain; it may be eight.

Q. During all this time—from the time you became subscriber down to the time of this conversation, Mr. Douglass followed—did he not, the business of keeping that mercantile agency?

A. Yes; formerly it was Tappan & Douglass.

Q. Tappan went out, and it was continued by Douglass?

A. Yes.

Q. Did Mr. Douglass, at that office (Tappan & Douglass first, and Mr. Douglass afterwards) conduct a busi-

ness similar to what is described in that agreement of yours—obtaining and furnishing information to dealers, who might have occasion for it *in* their business?

A. Yes, sir.

Re-examined by plaintiff's counsel—

Q. Did you pay Mr. Douglass more than once for the privilege appertaining to your becoming a subscriber?

A. I should think I did, sir.

Q. When did you make the first payment?

A. I could not say.

Q. Was it at the time of applying, or at the time of becoming a subscriber?

A. I do not think it was; I think when he sent in his bill it was some time afterwards; it might have been the time, but I cannot say.

Q. When did you become a *subscriber*—7th November, 1853; the date is *here?*

A. Yes.

Q. By the Court: Is this the first time?

A. No, sir.

Q. By plaintiff's counsel: Was this the last?

A. I really could not say.

Q. Have you at any time since November, 1853, subscribed to Mr. Douglass?

A. I could not say, sir, whether I have or not.

Q. Do you know, sir, one way or the other, whether or not you applied orally or by writing for information concerning Mr. Ormsby?

A. I think I applied in writing.

Q. Where did *you* write out your request?

A. I cannot say whether it was in Mr. Douglass's office or in my own.

Q. Did you ever ask for anything more than the pecuniary standing and responsibility of men?

(Objected to by defendant's counsel, as this was new matter and leading.)

Q. I understood the witness to say that he is not certain whether his application was verbal or in writing; I so understood you, am I right in that?

A. I could not swear it was in writing; I think it was in writing.

Q. Do we understand you to say that *you* are not positive whether it was in writing or not?

(Objected to.)

Q. State what you mean by this expression—that you think it was in writing, but are not willing to swear it was?

A. Because it was our usual way in making applications.

Q. Can you assign any other reason for thinking it was in writing than that you usually presented your applications in writing, if yea, state what?

(Objected to as leading; objection overruled, and exception taken.)

A. There was no other reason.

Q. Have you now any recollection of the contents of your application, if *it* was in writing?

A. No sir, I have not.

Q. What inquiry did you make of Mr. Douglass concerning Mr. Ormsby?

(Objected to. Objection sustained.)

Q. Did you make any inquiry of Mr. Douglass at any time concerning Ormsby, except as to his pecuniary standing and responsibility?

(Objected to on the ground that the question was leading. Objection sustained.)

Q. At or about the time of your calling on Mr. Douglass, as you have stated, did you have anything to do with a note of Ormsby's, on which he was maker or indorser?

A. Yes.
Q. What *did* you do with the note?

(Objected to. Objection sustained.)

Q. Did you call upon any one with a note of Mr. Ormsby's?
A. I did.
Q. What was the name of this person on whom you called?
A. In relation to getting it discounted?.
Q. Yes, sir.
A. It was a bank sir.
Q. What bank?

(Objected to.)

Q. State any facts, if you know them.
A. I offered the note at a bank in the city for discount.

(Objected to.)

Witness: I can fix the date from knowing the date at which the note was discounted, and *the* proceeds went over to Mr. Ormsby; these were the first inquiries that I made in relation to the matter.

Q. Who discounted the note?
A. It was discounted by the Mercantile Bank.
Q. With whom?
A. With Mr. Blake, cashier; I did business with the directors of the bank.
Q. Do you recollect whether that was on the 28th day of July, or not?
A. I found, referring to my bank book, that it was on the 28th of July, 1854.

Q. *By the Court:* Was that the day of the conversation?
A. No, sir.

Q. *By Plaintiff's Counsel:* Did the conversation take place before or after?

A. After.

Q. How long after?

A. I cannot say; it was within two months; the note was not Mr. Ormsby's note.

Q. Give us your present recollection of the time whether it was one week or two weeks.

A. I think it was within two weeks, but it was within two months certainly.

Q. You say you had previously applied to Mr. Douglass, and received information from him in your dealings with him previously?

A. Yes.

Q. I wish to know whether the responses to your inquiries *came* to you verbally, or in writing, as to other people?

A. It usually came in writing.

Q. On this occasion he refused to put it in writing?

A. No, he refused to state the matter on the books; I always did the writing myself.

Q. What was it that he said to you about not giving it you in writing?

A. He did not wish to give me information that I could take down.

Q. He did not wish you to take a memorandum?

A. I cannot say: I have stated all that he said to me.

Q. I will ask whether or not this second conversation was before the suit commenced or not?

(*The Court:* He has stated positively that he did not know.)

Q. At the time of this second conversation with Mr. Douglass, did he say anything to you about having received a letter from Mr. Ormsby's lawyer?

A. I do not know what conversation you allude to.

Q. You say you think within two weeks, certainly within two months after this conversation to which you have

testified, you had another conversation with Mr. Douglass

A. No; it was about the first conversation we are *talking* about.

Q. You have testified concerning the first conversation concerning the second you have not testified; I will ask whether or not, in that second conversation, Mr. Douglass said anything about having received a letter from Mr. Ormsby's lawyer?

A. I cannot state the time; no, sir.

Q. I am asking about what Mr. Douglass said?

A. Mr. Douglass wanted to know——

Q. My question is this. Did he say anything to you in this second conversation about having received a letter from Mr. Ormsby's lawyer?

A. Yes, sir.

Q. What did he say about that letter?

A. He stated to me that he had received a letter from Mr Ormsby's lawyer; that he came to me in relation to the information that he gave me, as I was the last person that applied.

Q. Did he say anything whether any suit had been commenced or threatened?

A. No, sir.

Q. Did he state the effect of that letter or the purport of it?

A. No sir, he did not, that I recollect.

Q. I now ask the witness to give us that coversation, if the Court please.

(Objected to. Objection overruled, and exception taken.)

A. I cannot *say* whether he came to my office, or whether I was in his; I think it was in his, and I asked him if he had made further inquiries in relation to Mr. Ormsby, and he said that he had, and I asked him what the result was, and he said that the report was not so much out of the way after all; he never repeated to me those words afterwards, that he stated to me first.

Q. He said what you have said here?

A. Yes, sir.

Q. In this conversation you say he spoke of the letter —*did* he say anything else?

A. We had considerable conversation.

Q. Give us all the conversation?

A. I cannot state it any further than I have.

Q. Do not foreclose yourself and us so soon, in this conversation, did he say anything about having given the same information to others?

(Objected to, as leadiug. Objection sustained.)

Q. Now, I want you to give the whole of that conversation from beginning to end, that you had with Mr. Douglass upon that occasion, without drawing your inferences at all of what was said?

A. I believe that I have stated all *that* I can recollect was said.

Q. Do you recollect whether anything was said about others?

A. Yes; I believe I stated that before.

Q. No, you have not; you may now state what was said about others.

A. The reason he came to me was that he had given it out to some others; some four or five; I think he said that was the reason he came to me, as I was the last one to make enquiries.

The plaintiff, further to maintain the issues on his part, called as a witness—

Avery C. Babcock, who, being sworn, testified as follows:

Q. Are you in the employ of Mr. Douglass?

A. I am, sir.

Q. How long have you been?

A. Eight years, sir; I have been seven years there at any rate.

Q. You have a suit with Mr. Ormsby, or had, in which he sued you?

A. Yes.
Q. Was it libel or slander?
A. Well, I do not know what it was.

(Objected to: the record must be presented).

Plaintiff's counsel here produced a complaint in the following words:

THE SUPERIOR COURT

OF THE CITY OF NEW YORK.

WATERMAN L. ORMSBY,
agt.
AVERY C. BABCOCK.

City and County of New York, *ss.:*

The plaintiff complains of the defendant and says, that the plaintiff is, and for several years past has been, engaged in the business of bank-note engraving and printing, and of engraving generally, in the City of New York. That the defendant, on or about the first day of June last, contriving and wickedly and maliciously intending to injure the plaintiff in his good name, fame and credit, and to bring him into public scandal, infamy and disgrace, with and amongst all his neighbors and other good and worthy *citizens*, and to cause it to be suspected and believed by those neighbors and citizens that the plaintiff had been and was guilty of the offences and misconduct hereinafter mentioned to have been charged upon him by the defendant, and to vex, harrass and oppress him, the defendant, as the, plaintiff has been informed and believes, and so charges, did, on or about the said day of June last, at the city of New Haven, in the State of Connecticut, to wit, at the city and county of New York, in a certain discourse which the defendant there *and* then had, in the

presence and hearing of and with divers good and worthy citizens, falsely and maliciously speak, declare and publish of and concerning the plaintiff, and of and concerning the plaintiff in the way of his profession and business of bank-note engraving and printing, and of engraving generally, the following false and scandalous, malicious and defamatory words, that is to say: "He (the plaintiff meaning) has left his wife and is living with a prostitute," and "He (the plaintiff meaning) had and has been engaged in counterfeiting. He (the plaintiff meaning) is a licentious *man* and of bad reputation; a counterfeiter and bad fellow. He (the plaintiff meaning) has been a counterfeiter and works at counterfeiting."

By reason of the speaking of which said false, scandalous and malicious words the plaintiff is greatly injured in his good name, fame, credit and reputation as an individual and a man of business, to his damage ten thousand dollars, for which amount he prays judgment and costs.

ROBERT G. PIKE,
Plff's Att'y.

City and County of New York, ss.:

Waterman L. Ormsby, the plaintiff herein, being duly sworn, saith, that the foregoing complaint is true of *his* own knowledge, except as to the matters therein stated upon information and belief, and as to those matters he believes the same to be true.

W. L. ORMSBY.

Sworn to before me, this 24th day of November, 1854,

C. C. PINCKNEY,
Commr. of Deeds.

Q. Is that your signature to that jurat?

A. I signed a paper, but that does not seem to be my handwriting.

Q. Is this suit brought by Mr. Ormsby, against yourself now pending?

A. I know nothing to the contrary; I know nothing about the suit.

Q. Has it *not* been ended?

A. Mr. Pike promised my brother it should be ended; that is all I know about it.

(Objection made to any conversation between witnes's brother and Mr. Pike.)

Q. The suit is not yet determined?

A. Not that I know of.

Q. Was there an opposition between you and Ormsby relative to the settlement of this suit?

A. No, sir.

Q. Was there anything said by you to Mr. Douglass, concerning the settlement of this suit?

A. Something by my brother; I called to see him.

Q. Has Mr. Douglass indemnified you against the damages in this *suit?*

(Objected to.)

Plaintiff's counsel offered to prove that Mr. Douglass had indemnified witness for the damages in his suit *ads.* Ormsby.

(Overruled and exception taken.)

Also, to show further that since the commencement of this suit the defendant has paid the sum of $1,000 to John S. Dye, for the purpose of proving his defence in this action.

By the Court—How do you mean proving his defence?

Plaintiff's Counsel—By buying certain plates loaned by the plaintiff to Dye for the purpose of a particlar lecture in the Tabernacle, in the city of *New York*, and which were to be returned by said Dye to said plaintiff immediately on the conclusion of the lecture.

(Overruled and exception taken.)

The plaintiff, also, offered to show by the witness, efforts on the part of defendant to procure testimony as to the truth of the slanderous words.

It was admitted that this suit was commenced on the 26th day of September, 1854.

The plaintiff's counsel here rested the case for the plaintiff.

The defendant's counsel moved for a non-suit, on the ground that the words spoken by the defendant concerning the plaintiff appeared to *have* been spoken confidentially in the course of the defendant's employment to one of his employers on the application of the latter, who had need of the information for the purpose of governing his discretion in his business.

That under the circumstances in evidence the communication was not unlawful, there being no evidence of malice or bad faith.

Which motion the Court granted, with a stay of proceedings for twenty days, to enable plaintiff's counsel to make a case, to be heard in the first instance at the General Term, with liberty to turn the same into a bill of *exceptions*.

PIKE & GALPIN,
Attys. for Plff.

FULLERTON & DUNNING,
Attys. for Deft.

In support of the motion for a non-suit, the defendant's counsel addressed the Court as follows:

This case, as it is presented by the plaintiff, brings up

for consideration a question of no intrinsic difficulty, but which, in this precise form, is somewhat novel in the Courts of this State. It is therefore of some interest, and may properly receive a very full and deliberate consideration. The novel form in which it arises does not necessarily render it difficult to deal with the question; for it was well said by a learned and able judge, whose remarks are often cited, that when cases present themselves to a Court, which are merely new in the instance, it is as easy to decide them, and to apply principles to them now, as it was two centuries ago, and will be as easy two centuries hence as it is now. It is only when, in the common law or the existing statute law, there can be found no guiding principles, that courts are embarrassed and sometimes constrained to await legislative enactments adapted to the case. It has been sometimes said that in disposing of a case new in the instance courts legislate They do not. They only administer the known law, and apply its established principles to a case new in the particular phrase of human action which it presents.

The defendant insists that his act in making the communication complained of by the plaintiff is sanctioned by doctrines well known as the law of "privileged communications."

Before stating the principles that are to be applied, the facts in proof should be placed in a distinct light. This is easily done, for this case is remarkably free from obscurity or conflict in respect to its circumstances

The evidence is clear, and shows the precise relations which all these parties held toward each other. It appears that Mr. Benjamin Douglass, either in his individual capacity, or in conjunction with his late partner, Mr. Tappan, has for several years carried on a business called a "Mercantile Agency," in the city of New York. In this agency he has been in the habit of furnishing, and has made it a business to furnish, merchants and traders in the city of New York with information as to the standing of their customers for the purpose of guid-

ing them in their business transactions. The precise nature of the agency is very distinctly disclosed by the written memorandum, which is in evidence containing the agreement between the establishment and the witness, Mr. Benton.

Mr. Douglass, in such manner as may be practicable to him, provides himself with the fullest attainable information in relation to persons, whose position and standing may be important subjects of consideration to merchants and traders in New York when called upon to give credit to, or deal with, them. A carefully adjusted system for the purpose of giving this information is established by Mr. Douglass It is this: he has an office: in that office, in some form, (let it be supposed for the sake of plaintiff's case if you please,) in books provided for the purpose, he enters such information as he may acquire touching the standing and character of individuals engaged in business and likely to become purchasers here. On being applied to by a subscriber to his agency or by the clerk of such subscriber, Mr. Douglass is bound by the terms of his agreement to furnish confidentially to the subscriber for his own use, in his own business, such information as he may have acquired, in relation to any particular person inquired about. Such was the agreement of Mr. Douglass, and such is sufficiently shown in general terms to have been the character of the business of this mercantile agency. He provided himself with such information as he was able to acquire, and thus fitted and prepared himself for giving the needed information. His subscribers paid regular subscriptions to him for the purpose of enabling him to do so—to defray the expenses of his business, and leave him a reasonable compensation for his own services. He provided his subscribers with a printed blank very discreetly worded and easily convertible into an exact memorandum of inquiry; so that their application might always be perfectly understood. A glance at the form of the application distinctly indicates its character. It is an application by a merchant for information to be con-

fidentially communicated to him for his sole use in his own business, under a pledge not to use it beyond his business purposes or to communicate it to any third person.

Such being the general relations and understanding between the parties, what are the facts occuring in this instance, and of which Mr. Ormsby (the plaintiff) complains?

Mr. Benton, the witness, a regular subscriber to the agency, having occasion to be informed in relation to Mr. Ormsby, whose note he held, or was about to take, made one of these applications. He made an application professedly for the purposes of his own business interests. The application was made in writing; and consequently there can be no misunderstanding. It was made on the common blank and in the usual form. The mode of answering these applications is in all cases oral. The witness spoke of its being given in writing; but he means that it was given orally, and he wrote down the answer on his own memorandum for his own use. In this instance we have it in evidence that a clerk looked at a book, and then called another clerk, whereupon Mr. Douglas came forward and gave the answer. He stated at the time that he was rather reluctant to give the report; that is, to speak it so as to have it taken down. He expressed an unwillingness to have it taken down, or a desire that it should not be taken down. But he gave the statement or information which is now complained of. He indicated as a reason for wishing it not to be taken down, that it was so unfavorable—of course he advised his subscriber not to deal with Mr. Ormsby. Such advice is implied in all unfavorable reports, and the fact that in this case the advice was given in express terms, does not in the least vary the character of the statement. The facts communicated were intended to operate as advice, and the advice being in harmony with the facts stated, was of course given in good faith. His giving the advice indicates the precise motive which existed on the part of Mr. Douglass, and his conception of the pur-

pose which he supposed to have governed the applicant in seeking information.

This is the alleged cause of action for which this suit is brought. This is the whole length and breadth of the evidence. There is certainly nothing in the form of giving, or in the manner of giving, this responsive advice on his subscribers, application to indicate on the part of Mr. Douglass the slightest personal knowledge of Mr. Ormsby, much less ill-feeling toward him. On the contrary he manifested a certain disinclination that the thing said should in any way assume a permanent form, even by being written on a private memorandum by the person to whom he addressed it. If it had been thought necessary as a burthen charged by law upon Mr. Douglass to furnish express evidence, that malice was absent, this very line of action on his part—constituting the manner of the thing—indicates a desire that his information should have as little operation as possible consistently with his duty to the subscriber, and that it should be confined simply to preventing the individual who sought it from suffering any injury in consequence of dealing with a person whom Mr. Douglass supposed not to be a safe customer. That, I say, is the cause of action.

Another interview between Mr. Benton and Mr. Douglass has been given in evidence. I suppose it has not been given in evidence as an affirmative cause of action, but only by way of showing some ill-feeling on the part of Douglass—an attempt to supply evidence of express malice. I will however observe upon it without reference to that distinction, and speak of what was then said as if it were a substantive basis of the suit, precisely like the first comunication.

What is the second interview?

The witness says he does not remember whether it took place at Mr. Douglass's office or at his own. I suppose we should take it either way. He introduces the subject by stating that in the course of the conversation Mr. Douglass informed him that he had received a letter

from Mr. Ormsby's lawyer. That fact is proven in the case. When called upon to give the conversation "Ben-"ton says I asked him whether he had made further in-"quiries about Mr. Ormsby." He says Mr. Douglass did not then repeat the words which are now sued upon. The witness tells you that, and therefore I cannot see how that conversation could be a substantive cause of action. "But how did Mr. Douglass answer? He said "that he had made inquiries, and that the report was "not so much out of the way after all." This was an application just like the former, and if it were necessary to attach a privilege here, it is as easily done as in respect to the first occasion. This second application came from a subscriber. It was an inquiry as to the fact, and Mr. Douglass's answer is, that he did not find any thing materially different from the pretty strong statement made previously. If the first communication was privileged, I do not understand how the second can be less privileged. At all events the words then uttered are not the words charged in the complaint. There is no repetition of the words. Can you then treat this second communication as indicating the existence of malice?

He had not yet been actually prosecuted, but he had received a letter from Ormsby's lawyer, which is sufficiently indicated as a communication calling Mr. Douglass to account about this affair. If it should be asserted or believed that this threat of prosecution must have excited ill-will, that would not establish the existence of malice long before the threat was made. The malice which the plaintiff is obliged to show is malice at the time of uttering the words which are complained of in this action. At this last interview Mr. Douglass stated that the witness Benton was the last person to whom he had said anything upon the subject, and that he had only spoken of it to some very small number of others. He added that he (Benton) was the last applicant. This language "the last applicant" indicates who the other persons were to whom he had given the information.

They were subscribers to his agency, and applicants; consequently the statements which he made to others come within the privilege equally with that made to the witness Benton. And so far from his admission that he gave information to others being evidence of express malice, it is evidence that he had not unduly spread or circulated the report, and had given it only to applicants—just as he had given it to the witness. Therefore, neither in that second conversation with Mr. Ormsby nor in his admission that he gave the report to some few other subscribers, is there the least evidence of anything like express malice in uttering the words complained of.

Now let us see how the matter stands in relation to the communication which is the basis of the action. The inquiry is, was that a privileged communication within the principles which govern in actions of slander and libel? I have for a considerable length of time had occasion to consider the objections which a fertile imagination might suggest against this business. One readily recurs to a certain set of objections: they have all been suggested by the learned counsel (Mr. Pike) in his highly colored opening of this case.

First, that it is an unworthy thing to become a habitual searcher after the faults, weaknesses, errors and deficiencies of other men under any circumstances, and particularly if done for a pecuniary reward. Again, that the business necessarily involves the employment of subordinate agents, and that the agent, who hunts up the information and gives it to the principal, must be a person subject to this same observation. As it is an unworthy kind of business to pry into the faults and deficiencies of others, every such subordinate agent, from the very nature of his occupation, must be, or become a degraded person, and that by such a person, false statements may often be made from the worst motives. All these things may be very easily said. They may be said in a form well calculated to excite the imagination —to inflame the passions, and by their play, to seduce

the judgment. But it is done by borrowing illustrations from a field or theatre of action entirely different from that in which this business, as well on the part of the principals as of the agents, employs itself. No man will deny that the busy-body or tattler who, to gratify his private malice against an individual, or to indulge an evil habit of dwelling on the faults and blemishes of others, employs himself, either as a principal or as an agent, in picking up foibles for the purpose of retailing them to the world at large, or even of privily retailing them to those who take a pleasure in hearing evil of their neighbors, is an unworthy and despicable character. We must all agree to that. The tattler who goes about fomenting disputes and circulating to other men's discredit the tales which he may have picked up, is an odious and contemptible character, whether his narrative be true or false. And why? Because he does it for no good purpose. He does it to gratify an unworthy habit of mind. He can intend nothing but mischief by it. All illustrations drawn from the habits and conduct of persons engaged in an occupation of that kind, must be such as to excite contempt and abhorrence.

But let us see whether these observations of the plaintiff's counsel have any relevancy or application to the case before the Court.

What is the nature of the mercantile agency? What are its objects, why was it established, what is its utility?

We are constantly advancing in civilization, and in its accompaniments, one of which may be called luxury. That is, the enjoyment of all those physical and intellectual pleasures which man's condition in this life enables him to enjoy under favorable circumstances. I use the word luxury not in a sense which confines it to describing those kinds of enjoyment which are only allotted to the wealthy: I apply it to the enjoyments shared by the humblest members of society. I apply it to the mechanic; nay, to the mere laborer who works

for a dollar a day, and whose wife, pehaps, goes out scrubbing for a still smaller pittance. When these return to their homes in the evening, they enjoy their cup of tea brought to them across ten thousand miles of ocean; they sweeten it with sugar coming from another far distant clime. We have made such progress that even the fare of the humblest is made up of a variety, to form which "earth, air and ocean are plundered of their sweets." Great is the variety of enjoyments, which, as we improve in civilization and means of enjoyment, are in gradually increasing extent, brought within the reach of our people, to be at last participated in by the whole nation, the highest and the lowest.

Mankind have been and are constantly progressing; knowledge is constantly increasing. But yesterday, chemistry was literaliy unknown. To-day, that science furnishes to us, and to men of every grade and class, a vast variety of enjoyments, corporeal and mental. It leads to the production of a greater amount of fruits from the earth and of a better kind. It leads in every department of human industry to consequences highly beneficial, and conducing to the enjoyment of life by all classes. If we look back but a brief period, we find that civilization was confined within a very narrow space. We find that it was inferior in quality to that which exists at this day, as far as the general public are concerned. It has been gradually improving and expanding. The discovery of America opened this vast territory to cultivation by mankind, and we have here a garden producing means of enjoyment to the human family, which promises to present, in time not far distant a most extraordinary picture—an amount of actual enjoyment by millions, which so far exceed the former state of things, that the mind is utterly unable to keep pace with the glowing probabilities of the future.

This progress has not been merely a progress in abstract science; it has been especially a progress of knowledge in arts and manufactures. We appear to be approaching a period when men may cross the

ocean, not only without appreciable danger, but without being subject even to to the trifling and temporary evil of an hour's sea sickness. We yesterday had a ship launched, which cannot be burned, which, it is said, cannot be sunk, and as to her going ashore, those connected with her say, that if such an event should happen, "let the shore take care of itself, for it will be more likely to suffer than the ship." Again, it seems that we are shortly to have instantaneous communication with earth's remotest regions by the electric telegraph, thus bringing all mankind into immediate contact, and rendering us one great undivided society. The perils of the sea and its inconveniences are removed, and time and space are no longer barriers to the exercise of will. We hold them in the palms of our hands. And what is to be the effect of these great improvements? The effect must be that trade and commerce will expand with a rapidity and in a degree altogether beyond anything in the former history of mankind. New arrangements, devices and contrivances have been in our recent progress, and must still be constantly coming into practice, in order to make available in their most perfect and effectual forms, these new and additional facilities afforded us for the enjoyment of life.

What a vast field of discovery must lie open to ingenuity in relation to the transmission of messages over the telegraphic wires! What a wonderful field for the exercise of ingenuity has been opened by the construction of the Leviathan steamship! How much must yet be contrived and done in respect to these messages, that are to be suddenly transmitted from one end of the earth to the other. In many cases secrecy is indispensable and must be practised. The manipulator working upon the telegraph must be kept as much in ignorance touching the import of the message conveyed as the wire itself upon which the message travels. A method must be adopted to avoid mistakes; and checks and counter-checks must be devised and adopted to pre-

vent fraud. Thus your Honor will perceive that, from time to time, new and hitherto unknown contrivances must be adopted to keep pace with newly developed facilities in the management and conduct of even those things, which in their general nature, were not before unknown. Among these we may reckon the mercantile agencies. As trade is so generally expanded and population so thinly distributed over the vast surface of these states, it has been found necessary that New York and other great marts for supplying the interior, should have a better means of acquiring information as to the means of applicants for credit, than any which formerly existed, either in the little island of Britain, or even in this country when her settlements were comparatively few and lying within short distances of the sea-coast.

Under the old system of doing business what was the practice? When a merchant in New York was applied to for credit, the applicant, if coming from a distance, might bring with him some certificates as he could get from his neighbors; but who were his neighbors? Perhaps there was not one person among his neighbors as well known as himself. He might bring a certificate from his minister, or if he could get it, one from his rival in business. With these vouchers he might come to New York, make his application, give the party from whom he desired to buy, a fortnight or so to make inquiries, to write letters and otherwise to search for the requisite information. This was the only known course, and it was found to be exceedingly inconvenient. It has been found that in this as in all other things the people of this country have occasion to move rapidly. When a man applies for credit he desires to get it at once, or at once to meet the refusal which must turn his efforts to another direction. In order to meet this exigency it is necessary that the merchant should have some means of ascertaining promptly the character of the proposed customer. Without further illustrating by details, it may be asserted that the means of obtaining information as to the credit of a new comer from St. Louis or other distant

point proposing to purchase here, was formerly involved in much embarrassment, and if that embarrassment could not be overcome, our progress in trade must be greatly retarded. But American ingenuity is equal to every emergency; and the invention, if it may be so called, of these mercrntile agencies was the result of that ingenuity. Its origin was imputed to Mr. Douglass by the plaintiff's counsel as a matter of reproach. I do not disclaim for him under the idea that it would be a matter of reproach, but the fact is otherwise. It is well known that it originated with an eminent mercantile law firm in this city. A junior member of that firm who was the most active in practically developing the idea, subsequently occupied for many years, as a judge of this Court, the position which is now filled by your Honor. The project was supposed to be entirely upright and honorable by him and by his associates. And why? Because as your Honor will perceive, the New York merchant did not seek for false stories, scandal, tattling, or evil information. On the contrary, the New York merchant desired a good report if he could possibly get it consistently with the truth of the case. His object was to sell if he could; and only to be prevented from selling when prudence enjoined it upon him to forbear. When a New York merchant applied at a mercantile agency as to the credit of a proposed customer, and he learned that he was unworthy of credit, he would, of course, watch the effect of that advice. If he found that the rejected customer patronized others and justified their confidence, he would naturally conclude that the advice of the mercantile agency was unreliable and discontinue his connection with it. It was, therefore, undoubtedly the interest of the persons conducting the agency—and there is no stronger tie than that—to procure for the New York merchant the most truthful information in regard to their country customers that could be procured. Should merchants lose customers through information to the customer's discredit, they would, of course, communicate the fact to each other, and this would inevitably destroy the

credit, standing, and, consequently, the business of the agency, from which the information came. Its evil reports instead of producing extensive mischief to others, would involve itself in bankruptcy. Your Honor must perceive therefore that the principal in the establishment is bound by the strongest impulses to get and to give the most favorable reports that he can consistently with truth. If he does not pursue that course, his business must certainly soon go to the wall. How is it with the subordinate agents? These subordinate agents are not selected from among tattlers, and those engaged in small business operations, but among men of good habits and character.

The learned counsel has suggested, that persons of good character would not undertake the employment. If this business is base, unjust, unworthy, dishonorable and pernicious in itself, I grant that good men would not be employed in it. But if it is not so, if we can say that it is just, that it conduces to beneficial results, that it facilitates business, I should like to know why a worthy, honorable and upright man should decline to support it, or hesitate to obtain and transmit information to his principal in a prudent form, for the purpose of being used in this way.

There is but one consideration to restrain a fair man of fair character from undertaking this employment. It is the danger of resentments to which it might expose him, where he may happen to give an unfavorable account of a dealer. That consideration is also calculated to induce men to be cautious, and to give the most favorable account they can give with propriety. In judging of the moral tendency of the business, this distinction is always to be borne in mind; it is not the voluntary tattler, who for no purpose other than the love of slander speaks, but it is a man employed for the purpose, whose business it is made to hunt out the truth, and discriminate as well as he may between what malice may suggest, and what fair and honorable men of good character may give in the form of information. That is his duty: that is his interest. All the promptings of honor, duty, and even of selfishness

are toward the adoption of favorable reports. If the sub-agent makes a good report and the truth warrants it, he does what is agreeable to his employer, and to the person for whose use the report is communicated in New York: if he sends a bad account, all the evils and danger that I have spoken of are present to his mind as possible results. His employer or principal is dissatisfied and of course dismisses him. There is danger too of its coming out, that he has spoken to the prejudice of his neighbor, and he may encounter the hostility of that neighbor.

By general abstract reasoning, the learned counsel has endeavored to make out, that the subordinate agent must be a vicious person and of an unworthy disposition; that he must be one who enters into those operations to gratify his malice. The answer to which is, that the person so employed does not go into it wantonly. He does it because it is his interest, and because he is rewarded, according to the nature of his labors in the employment, by some suitable compensation. He does it for business purposes. He does it not that his discoveries may be talked about, but that they may be used confidentially under special provisions securing privacy, and only when some business operation calls for it. It is in its whole nature and bearing a different thing from the practice of the wanton tattler.

Well, sir, has practice tended to show that these suggestions of the plaintiff's counsel have any foundation in fact? How many suits of this description have been ever brought? Have the Courts been troubled with them? The business has been in existence certainly much more than twenty years. I remember myself happening to be informed of their existence during a journey to Charleston in the year 1835. That is twenty-three years ago. How many suits of this description have been brought in the interim? They are amazingly few in number: I believe there are but two verdicts recorded as having been rendered for the plaintiff in such cases. Against the whole circle of mercantil agencies, those well conducted, and those which are not so judiciously managed, there have been but two verdicts-

There is but one verdict against any company conducted as this is, and that verdict has not passed into a judgment. Probably it never will.

Therefore your Honor may see that this general reasoning as to the probable result of such a business however plausible in theory, is very ill-sustained by practical tests. If men had been slandered, if this was a mere shield for the gratification of malice and revenge, how happens it that more have not complained, and brought their complaints before a Court of Justice? The fact that hardly any suits have been brought, furnishes the most conclusive evidence, that in their practical operation these agencies have been conducted in such a way as to give universal satisfaction. Confidence has been almost invariably well kept.

The imputation, whether strictly accurate or not, which prevented credit from being given, has been preserved within the sphere of that confidence by which it was intended to be shielded from general observation and where, as we maintain, the law shields it from responsibility.

Of course, I am obliged to stop here in relation to this kind of illustration. I am not permitted to mention to your Honor the names of those persons who, in small towns and villages throughout the country, have consented to act and have acted, as subordinate agents. But, relying for the proof of what I say on the manner the enterprize has worked, giving general satisfaction, and not leading to lawsuits, I feel justified in the assertion, that the persons who have acted as subordinate agents, and have given information to the principal agencies have ever been men of prudence and discretion and observers of truth. If names were given, many would be found who, in our Courts of Justice and in legislative and executive stations, have attained high eminence.

Let us look a little further into this question: Is the benefit of these mercantile agencies confined merely to the wholesale salesman at the seaboard, and protecting him against undue confidence in the unworthy—against

the error of selling his goods to persons who do not intend to pay for them? Is it narrowed down to that? Is its sole effect to prevent loss by the great wholesale vendors, or even by the small jobbers in New York? Not at all, sir; not at all, sir. The effect is as beneficial to the small dealer and the humble village shopkeeper in the interior, as it is to the merchant of New York. In the first place your Honor will perceive a certain facility that it affords to the small dealer residing in the interior. He comes to New York, transported, as if upon the wings of the wind, by railroad. He makes his application at ten o'clock in the morning for a purchase on credit and by four in the afternoon his goods are on board the freight boat, or freight car, on the way to his country home. He loses no time in dealing here. He brings no budget of certificates All that is necessary for him is to tell who he is, where he comes from, what is his business, and what he wants. I mean, of course, if he is worthy of credit. There is in this way a prodigious saving of time to him and to the New York merchant. Coming from a remote point it might be exceedingly difficult, were there no mercantile agencies, for a man of limited means and needing credit, to furnish satisfactory evidence that he was worthy of credit. He would present, perhaps, a certificate from his minister, but the New York merchant might not happen to respect that particular minister much, or, perhaps, might have a prejudice against ministers of that denomination, or the cloth generally. Besides, a merchant might not think a village minister, the village lawyer, or the village justice of the peace, very good judges of pecuniary credit. Every other effort to establish his reputation resorted to by the stranger in town might be ineffectual. Under the mercantile agency system, no effort is necessary on the part of the proposed buyer, to bring with him a character. The character which exists among his neighbors travels with him. He comes to New York, and that character, attested by proofs, upon which the New York merchant is willing to rely, is here before him. It awaits him here; or if,

perchance, it happens not to be registered in the agency, that institution, aided by the Magnetic Telegraph, is enabled to ascertain and report upon it without delay.

What evil can result from this system to anybody? Why this, and this only. Persons who may have a bad reputation among their neighbors, and are yet innocent of all the things that are said against them, may sometimes fail to get credit, though deserving of it. Innocent though they be, their neighbors not being satisfied of their innocence, they do not get greater credit here than they can obtain at home. An instance may occur when this, upon the whole, would be actually unjust; that is to say, the person may be innocent of the things generally considered to be true and urged against him by among his neighbors. Yet, how are all the transactions of life governed? If the New York merchant could be in this man's little village and hear the people generally say that he was unworthy of credit, would he not refuse him credit? Would he seek out, sift, and inquire, and have a trial? No! He would condemn him upon his general reputation. The same things occur, sir, in Courts of Justice If a man is examined to prove a fact, and twenty or thirty witnesses are then produced and say that from his general reputation they would not believe him, his evidence is set aside. That may often be unjust, but still it is the practice. Institutions, or arrangements of business, which, upon the whole, operate beneficially to the parties concerned, that are not in themselves inherently unjust or immoral, and have no necessary tendency to mischief, are not, I apprehend, to be condemned or censured, because it is possible that they may sometimes mislead, and do injustice by being the vehicles of unjust imputation.

With these general observations upon the nature of these establishments, I proceed to inquire whether they are not fairly within the rule concerning privileged communications and when fairly conducted, exempt from responsibility by force of that rule. I find the law laid thus down in *Greenleaf's Evidence, Vol.* 2, *Sec.* 421 :

"If a person having information, materially affecting the interests of another, honestly communicates it privately to such other party, in the full and reasonably grounded belief that it is true, he is justified in so publishing it, though he has no personal interest in the subject-matter and though the danger to the party is not imminent." I refer to the cases cited in a note to the 6th Edition.

This doctrine is very distinctly affirmed in *Howard* v. *Thompson*, 21 *Wend.*, 335, and in *White* v. *Nichols*, 3 *Howard's U. S. R.*, 287.

Mr. Greenleaf at the place before cited, Vol. 2, p. 421, adds many pertinent remarks in support of the general doctrine. He shows that this is a rule very much favored in the law. It is said that the transactions of life cannot be carried on unless, when a man is applied to by another in reference to a transaction involving his interest, he may go to his neighbor, or employ an agent, to seek information and receive it confidentially, without the neighbor who gives it being thereby exposed to any action. Again, it is said to be one of the duties of good neighbors when they know that a person is likely to have a dealing with one who is unworthy of credit, to go to that person, and voluntarily communicate the supposed facts to him, for the purpose of enabling him to be upon his guard, and to avoid the evil consequences which might result. This principle is general; it is universal. * * * It applies as well to an individual who is employed and paid to hunt up the information and to communicate it, as to any other person, and for the plain reason, that if a man has the right himself to search for information he has a right confidentially to employ an individual to search for it. And the right to employ an agent to search out the information, would indeed be vain and nugatory, if it did not include a right upon the part of the person who seeks and obtains it to communicate it to his employer.

So the case before your Honor is not distinguishable,

from the common every day instance of a confidential communication by one agent to another or to his employer, unless it be in the circumstance, that the agent here is employed to render, and paid for rendering, this particular service.

It may be proper for me before going further into the general principles governing the law in relation to these confidential communications, to show that that circumstance has not been considered as having any weight whatever. Indeed, in reason it ought not to have any weight. For this purpose I refer your Honor to the case of *Washburne* v. *Cook*, 3 *Denio, page* 110. In this case "a sheriff having levied upon certain cattle which "were subsequently driven away, employed the defend- "ant, a student at law to ascertain the facts and advise "him what to do."

This young man was hired for the purpose of following the person who had driven the cattle away, and searching into all the facts and circumstances in relation to the conduct and motive of that party, in order to advise the sheriff concerning an anticipated controversy. He did advise him of many facts prejudicial to the plaintiff in a letter containing the most severe language that could well be used. After stating the unfavorable reports, he adds, "*I think so too.*"

This letter by no intentional breach of confidence came before the public. It would seem that at a subsequent period it was found in an out-house, where it had been accidentally thrown. The finder published it, and an action was brought against Cook, the young law student, for the libel contained in it. The plaintiff obtained a verdict. In setting aside this unrighteous and illegal verdict, the Court, by Chief Justice Bronson, spoke as follows:

"If the letter was not a privileged communication, if "there was nothing in the occasion of writing it to dis- "tinguish this from the ordinary case of making a slan- "derous charge against another, the Judge was clearly "right in his instruction to the jury. In the common

" case of a libellous publication, or the use of slanderous " words, the charge of malice in the declaration calls for " no proof on the part of the plaintiff, beyond what may " be inferred from the injurious nature of the accusation. " The principle is a broad one. In all cases where a man " intentionally does a wrongful act, without just cause " or excuse, the law implies a malicious intent toward " the party who may be injured; and that is so, even " though the wrong-doer may not have known at the " time on whom the blow would fall. But in an action " for defamation, if it appear that the defendant had " some just occasion for speaking of the plaintiff, malice " is not a necessary inference from what, under other " circumstances, would be a slanderous charge; and it " will often be necessary for the plaintiff to give other " evidence of a malicious intent. There may be many " of these privileged communications; as in a regular " course of discipline between members of the same church " in answering an inquiry concerning the solvency of a " tradesman, or banker; or where the communication " was confidential between persons having a common " interest in the same subject to which it relates. In " these, and other cases of the same nature, the general " rule is, that malice is not to be inferred from the pub- " lication alone. The plaintiff must go further, and " show that the defendant was governed by a bad mo- " tive; that he did not act in good faith, but took ad- " vantage of the occasion to injure the plaintiff in his " character or standing. These principles are sufficiently " exemplified in the cases cited by the defendants' coun- " sel."

The rest of the argument related to the practical question whether the proper course was to non-suit instead of advising the jury to find for the defendant.

Mr. CHAUNCEY SHAFFER, the plaintiff's counsel, was then heard as follows:

Coming at once to the question, whether or not this is a case in which the Court should direct a non-suit, or pass the case onward to the jury.

I perceive no greater difficulty in this case than in others of this kind. As has always been the case, the tongue has been claiming unbridled license, and the fact that it has become chronic does not waive any well-established principle of law. I thought the counsel yesterday felt the burthen of his task. He would seem to put the defendant in this suit in the position of a man surrounded with the necessities of his position: and here I apprehend is some trouble in the defendant's case. He has assumed to himself the high prerogative of sitting in judgment upon the character, the standing and reputation of his fellow men: he has entered upon a dangerous path. The whole case narrows itself down to this: I locate myself in the heart of the city of New York; I send out my agents to scour every little village throughout the land, collect the neighborhood gossips and petty slanders, bring it to New York, make a great reservoir here, endow it with a kind of immortality by writing it down, and peddle it out at $25 to $50 per annum! There is very little privilege in that. The man who does that is in the situation of the man who stores gunpowder—he must keep it confined. On him rests the responsibility of confining the dangerous element; for when the explosion does take place, ruin must follow. And I think the same learned judge, from whose opinion we have been favored with an extract, in the case of Tappan, held that the same duty pertained to the defendant that would be to a man who kept a ferocious animal—at his peril he must restrain the animal.

Whether or not the case is entitled to go to the jury may depend first on the question whether there was a duty imposed on this defendant to say what he did say. This involves the consideration, what information was asked of him? I am assuming now that his business is the same as that of any other business man in the community. I go to him with a fee in my hand. I desire information as to the pecuniary standing of A. B.—his standing as a business man. I wish to know whether

he is a proper person for me to trust, or not. That answer is met when the response comes—"He is in failing circumstances. He has become insolvent. I understand that misfortune has overtaken him,"—or, "I advise you not to trust him." So far, perhaps, the defendant might shield himself under the plea of privilege. But does he pause here, or does he take a step beyond privilege? for if he do, then he is liable, and in this form of action, the only form of redress known to our law.

And what are the facts in this case? They are very brief. Mr. Benton states: "I made my application to the clerk; the clerk examined the book; he beckoned to another clerk, who came; that clerk examined the book and beckoned to the defendant, who came; he said, I cannot give you a report in writing about Ormsby;" and the reason he assigned was, that the report was so very bad; witness told him he was surprised he should have a bad report about Ormsby; that he was acquainted with him, and he thought Mr. Douglass might be mistaken. Mr. Douglass then said Ormsby was a bad man—a man of no responsibility. He assumes the responsibility of an unequivocal, affirmative declaration—and then he advises the witness not to have anything ot do with him,—that "he worked for counterfeiters, and was a counterfeiter!" We have heard of shields, and of broad shields; but I apprehend the shield of privilege will never make it safe for any man whose words are worthy to be acted upon, to embrace so small an opportunity to send such universal ruin to a business man! The idea is not to be tolerated, that because a man wishes to know the responsibility of his neighbor, the party applied to should seize the opportunity and make it the occasion of a charge which, if true, should banish a human being from society. Privilege does not have that extent. The privilege is as broad as the inquiry, and no broader. The inquiry answered, the privilege ceases, and all that is volunteered beyond that is done at the peril of the person opening his mouth.

Then, again, the Court will bear in mind this further

feature of the case. Two weeks afterwards, on the occasion of the defendant calling on the witness, or the witness calling on the defendant (and he cannot say which), but it is testimony that no application for information was made to the defendant; there is no proof that any such application was made, but the proof, as far as it goes, is quite the contrary, for Mr. Douglass himself says, "I have received a letter from Ormsby's lawyer; it must be that you mentioned or conversed of what I told you, because you were the last one to whom I made the statement; I had only made it to three or four other persons." He did not say whether those other persons were subscribers, or not: therefore the case now stands in just this light, that the defendant volunteered, on another occasion, to reiterate the truth of his previous statement—and by reiterating the truth of the statement in that language, he reiterated the language itself. It was a second publication; and under the decision in 6th Hill, we can prove as many different speakings of the same words as we have witnesses on the subject. It stands, then, that on one other occasion, subsequent to the first, and on three or four other occasions, the defendant had repeated this slander to other persons. So that is the proof. The defendant said he had done so, and being testified to, it stands proved. At least four distinct slanders, where the question of privilege cannot be hinted at.

"Mr. Douglass, what is the standing of Mr. Ormsby?" "Very bad." You are privileged. "I advise you to have nothing to do with him." Debateable whether that is privileged or not. But "he works for counterfeiters," meaning that they are in his confidence, that they are his patrons. A step further, "He is a counterfeiter." Mr. Douglass then said that Mr. Ormsby, a respectable man—a man whose character they dare not assail by their defence, for they do not justify—says that he ought to be in the State Prison. Yet privileged!

"If the defendant believed in its truth," is one requisite; "if he acted in good faith" is another requisite; "did not make the charge before more persons than necessary," is the third requisite; or "in stronger language than was necessary," is the fourth requisite.

If all these combine in this one case he is privileged; if one of these requisites be wanting, he is not privileged; and whether privileged or not is a question of fact for the jury whose prerogative it is with a discrimination almost omnipotent, to penetrate the motive and comprehend the pulsations of the human heart.

I may remark upon this, as throwing light upon the position in which counsel have sought to place the defendant in this case. The defendant is here as a person doing business on his own account. Formerly it was Tappan & Douglass; now it is Douglass alone. He has not entered into association with Ormsby, or Ormsby with him. If Ormsby were a member of that establishment or a subscriber to it, he might be said to have covenanted with mischief—he might be said to have agreed with the defendant that he might say of him what he considered to be the truth. But Mr. Ormsby is in the position of your Honor or the counsel. We are outsiders. We know not the secret working of that dark, mysterious, purely confidential arrangement. We may feel, but not see, the hand that sends the arrow through the bleeding heart. They are secret—they are confidential! So are other persons banded together for unlawful purposes. They say to the night, "cover us." They do not utter the prayer of Ajax, "Let me have the light of day." But they ask to walk with silent tread, and to travel as slanderers do, on the midnight air and with deadly results.

I apprehend that assumption is not warranted by the facts. I apprehend that here is proof of express malice; proof derivable from the fact that the defendant answered to more than he was called upon to answer,—or rather availed himself of the occasion to answer a question, and launched off into a charge of the most henious character—this little card being altogether too narrow to justify his statement.

"Give us in confidence, and for our exclusive use and benefit, in our business, whatever information you have respecting the standing, responsibility, &c., of Waterman L. Ormsby."

When or on what occasion these tickets were got up —whether for the purpose of saving the defendant from the legitimate consequences of those acts he contemplated might be necessary in carrying forward his business, to wit, the making of slanders, is not for mo to say, nor probably for the Court,—but for the jury. Such devices are resorted to. We know that it was the case in Boston, when a law about which many differ, commonly known as the Prohibitory Liquor Law was passed, and parties avoided it by striped pig in the bar-room,—charging six cents for a sight of the pig, and giving away the liquor. When I remember the case of Tappan in the United States Court, I am inclined to think this is merely a plan to evade the law, and the very manufacture of that device and the form of it, to my mind, is pretty strong evidence that the defendant well knew that his business was an illegal business, and therefore he throws about it all the hedges he can for the purpose of building up and fencing in a privilege somehow.

Now, if there be not legal malice the action cannot be maintained; but what we contend for at this stage of the case is, that it belongs to the jury, and it is a duty which I apprehend the Court will gladly give to the jury, to say, whether or not, from the facts in this case, the defendant acted maliciously; and when we ask this, your Honor will bear in mind that we pass over altogether the fact whether the defendant's business was legitimate or lawful. Upon that we may say nothing; but we say, for the sake of this motion, admitting the claim on the part of the defendant to be correct, that it is the same as one neighbor responding to the inquiry of another neighbor in the lawful course of business,—yet it is clear that the defendant did transcend a legitimate response; and the question is whether or not his answer to the inquiry was malicious.

It is proper in this connection, to call attention to a question growing out of the pleadings in the case. The defendant has no where affirmed the truth of his answer. On the contrary, he comes into Court and throws him-

self upon a general denial of the allegations in the complaint, and says in effect that Mr. Ormsby is not a careful man. Mr. Douglass, by what authority does not appear, sets himself up as a conservator of public morals,—and like a kind neighbor, with the purpose of making my client a correct business man, and provoke him to good works, he accuses him of being a counterfeiter! Their answer is this, that we are not as careful as we ought to be. Their answer falls beneath the magnificient charge of crime, which five times the defendant has let slip from his own lips. And I may be permitted to say that, while I agree with the learned counsel who addressed you yesterday, and rejoice in the truth of many of his statements,—I fear while we are going forward in many things, we are retrograding in others. In some things, too, I am sorry to say, we are going a little too fast. I am sorry to say that money is put higher in the scale of public estimation than moral worth. I regret to say we have heard it said in Court, under oath, "A, B, is a man of truth and veracity, for he is worth $200,000!"—But, sir, my learned friend cannot belong to that school, for he knows the value of character,—and I can only wish, for the sake of my client, that he had him to plead his cause.

In ancient times there was a construction called the Ear of Dionysius, which conveyed to him every whisper and every groan of his prisoners. We have the Ear of Dionysius in New York, with this difference, that while the Ear of the first Dionysius never transmitted a groan or a whisper that was not uttered,—this Dionysius gives expression to words without foundation, and when arraigned for giving utterance to them, he tries to shield himself, first, under a denial of the allegations, and then under a plea of privilege, the falsity of these statements being made patent. He has not dared to justify. Here is the answer. There is no charge of my client being a counterfeiter. What consequence follows? That he knew, when he uttered those words, they were false. He does not come out with a manly justification, and say,

"True, I charged you with being a counterfeiter and I will prove it." And at last, when we get his imprudent friend upon the stand, and drag the truth unwillingly from his lips, he throws himself on the plea of privilege: and my learned friend would make it appear that it was in a lawful business, springing up under the enterprise and advancement of the age! Sir, I trust that if we are to regain our lost Eden, it will be through some other channel than Commercial Agencies!

My learned associate has suggested to me a point which it is important to mention to the Court. It is this, that the defendant's knowledge was based, as he asserts in his answer, upon the facts there stated—upon the facts stated in his answer. And nowhere in his answer does he charge us with having been engaged in counterfeiting. Therefore there is a direct admission that he stated more than he knew; and that is malice.

The defendant's counsel further said:

My learned friend suggests that when a merchant applies for information touching the character of a customer which is to govern him as to whether he will deal with the party,—the privilege allowed by the law, is, the privilege, first, of saying he is insolent, or to that effect—and "I advise you not to trust him." Can this be so? Is this to be the only information? Are all persons of whom it may not be truly said they are insolvent, entitled to credit? Why, there are many solvent persons with whom it would be highly inexpedient to have any dealings. Therefore it cannot be that in the manner of communicating facts which are to influence the judgment of the inquirer, the party inquired of is limited to stating the facts merely covered by the idea of pecuniary solvency or responsibility. That cannot be. Want of punctuality, arising from indulgence, intoxication, or otherwise—a disposition to litigate, are all matters of fact which enter into the question of whether it is expedient to trust a man. And surely, being charged with,

or suspected, or believed to be guilty of criminal practices—no matter how henious, is a matter of fact of the greatest importance to be known to the person inquiring, and to govern him in determining whether to deal, or not. There are a great many things connected with dealings between men, irrespective of personal responsibility. If you are dealing with a man, no matter how responsible, who is guilty of not paying whenever he can escape, you must not let him have your goods without his promissory note. The facts and circumstances going to show that he is not a proper person to be dealt with, are important to be known.

Let us pass for a moment to my friend's second kind of privileged communications, which may be made. He says, it is proper enough to advise the party. "I advise you not to deal with him." Well, I believe that language is not actionable in itself, and he need not have made any difficulty about that. That is an advice any one may give, and a special case must be made to make it actionable. Therefore that cannot be the kind of thing called a privileged communication. It must be the statement of something reproachable which is a privileged communication. Can anything be more illustrative of that than the case where an employer said of a servant he was discharging, to the remaining servants, "This man has robbed me; do not associate with him, or I shall think you as bad as he." and yet that was held to be a privileged communication.

Again, is it to get advice whether to deal with a man, or not, that merchants go to a mercantile agency? I believe merchants prefer taking advice from their own brain and judgment; the object of making inquiries as to the standing of another is to ascertain some fact. The inquiry is not, of course, "would you advise me to deal with A. B? for, if the reply were in the negative, the next question would be, why? And if the party inquired of, said, I do not chose to tell you my reasons," the advice would be probably disregarded.

Let me come down to the particular inquiry in this

case. "Give us—in confidence, *and for our exclusive use and benefit, in our businees*, whatever information you have respecting the standing, responsibility, &c., of Waterman L. Ormsby?" That part put in italics places the party receiving the information under a solemn pledge that he is not to spread the thing so as to make it operate as slander. What does "standing" in this inquiry mean? It refers to reports in relation to the man—to the character which he bears, and it is information on those topics which is asked, and not the mere opinion whether it is expedient to deal with him, or not. What is this paper? Whatever artfulness may be imputed to it, I trust if it has the wisdom of the serpent, it will prove as harmless as the dove.

Well, it is said that in the reply that was made, the party went beyond his privilege. In what? He charges Mr. Ormsby, it is said, with a very atrocious crime. "He works for counterfeiters; he is a counterfeiter." Well, this question does not turn, as a point of law, upon the atrocity of the charge. This does not differ from the charge of robbery. The servant, of whom it is said that he steals from his employer, is most effectually ruined by such statement, if it is ventilated in such a way as to be generally known. Was that beyond privilege? Why no: it was just what the party called to inquire about. The enormity of the offence does not affect the law of the question. Apart from that, how far was there any travelling out of the privilege? What are the words spoken on that occasion? The bad words are those I have mentioned: "He works for counterfeiters; he is a counterfeiter." And I dare say, if the case were investigated it would appear that the alleged statement, "he is a counterfeiter" was not made, but is a mistaken recollection of the witness of the words he "worked for counterfeiters." But we are obliged to take the case as it is. What else was said? The other words are not slanderous in themselves. "He is a bad fellow; I advise you not to sell to him." Do these words indicate malice? They are rather a kind of halting com-

ment upon the principal charge. When you say a man "is a bad fellow," it means little more than some trifling delinquency. When you say "he is a counterfeiter," and add, "he is a bad fellow," you add a comment which does not indicate express malice. "I advise you not to sell to him." These words, as I said, are not actionable. What would be the effect of saying "he works for counterfeiters, and he is a counterfeiter"? Why it would not be necessary to say a word more; and these words come within the question of privilege, as I apprehend, therefore, as regards everything that was said, it appears to me the persons connected with the mercantile agency can never have a better case for the entire absence of everything beyond the simplest performance of duty; they can never have a better case, and perhaps rarely one so entirely free from anything which bears the slightest evidence of malice. On the contrary, there appears to be a desire to limit the effect of this information. The man is required not to write it down, as had been done in other cases, because the report was so bad that the person who had to make it would fain hope that it might be hereafter bettered, and he did not wish to run the risk of having it circulated further than necessary. It was his duty, however, that being his impression at the time, to state it to the party inquiring.

And now as to what was said at the second interview. It is not known whether this was before or after the commencement of this suit; but this is very certain: the witness will not say the first words were spoken before the 15th of August—and he will not say the second words occurred within two months after; while you have it in evidence that the suit was commenced on the 26th of September. What was that conversation? The witness says he called at Mr. Douglass's office, or, perhaps, Mr. Douglass called on him—and he asked Mr. Douglass whether he had made any further inquiry. He said he had, and the witness asked him what was the result. He replied that the report was not so much out of

the way, after all. When was this? If it was not after the commencement of the suit it was after Mr. Douglass had received a lawyer's letter, which is equivalent to the commencement of the suit. What else? Mr. Douglass spoke to this gentleman, probably with the purpose of inquiring whether he had said anything about those words; for Mr. Douglass said: You were the last applicant, and I had communicated it to only two or three before. Well, this communicating it implies that it was to applicants in the same way as Mr. Benton, as a matter of course.

My learnod friend presents this in two aspects: First, That it was affirmative evidence that those words were spoken to two or three different persons on different occasions; and then affirms that those words, so spoken, were original causes of action, which were not privileged. I object that the case cited from 6th Hill contains no such proposition as that a party who counts on one set of words, in one count, may give in the same case another set of words, spoken at another time, as evidence in chief to support his action. What Judge Bronson decides there, is, that they ought to allow, as they had in some other cases, that the slanderous words spoken at another time might be given in evidence to show the malice which existed in the speaking of the particular words on which the action was founded,—but that the jury ought to be instructed to give no damages for those words, but merely to take the fact that they were used at another time to enable them to say whether the words complained of were spoken maliciously. Therefore, in the first aspect in which my learned friend refers, they cannot be used as evidence in chief to support his action. And if they could, I think it would be a most irrational and unfair method of regarding evidence in a Court of Justice, to say that those declarations, Mr. Douglass says he made to other persons, were not made under the same circumstances as those which governed the communication to Mr. Benton, and therefore privileged in the same degree. Consequently, it they can be used as principal

evidence to sustain the action, the principle that applies to one applies to all the others; the evidence is the same in relation to the others as to this one.

And now to the point whether any of these things indicate malice. Why, as matter of course, if the declaration first made to Mr. Benton does not indicate malice, the fact that Mr. Douglass made a precisely similar statement to five or six other persons, applying to him in the same way, previously, would not alter the case; because it would seem to be as much Mr. Douglass's duty to communicate this to any other of his subscribers who required it as to Mr. Benton.

Then, as to the second talk with Mr. Benton it was *post*—it was after the suit was substantially commenced. Mr. Ormsby, with whom Mr. Douglass had no intercourse, so far as appears, and against whom he had no malice, had ascertained in some way, that he was aggrieved, and he felt disposed to complain, and had addressed a letter to Mr. Douglass which indicated hostilities. At that time Mr. Douglass, put upon his defence, had a personal interest in making inquiries as to how it was he was to be impeached. He had a perfect right to ask questions of this subscriber as to whether he had violated the confi dence reposed in him, and let out this matter; and if he said truly, that his inquiries did not make any material difference, that is surely no evidence of malice.

That if this case were now to be submitted to the jury, it would be your Honor's duty to say there is not adequate evidence on which to find the fact of express malice—a fact necessary to the plaintiff's case—and, therefore it is your duty to find for the defendant.

The plaintiff's counsel added: I will take the opportunity also to correct my learned friend in his supposition that I concede for the purposes of this suit, that the business of the defendant was of a character that entitled him to the plea of privilege. I thought I distinguished between those privileges which spring from the necessities of life and social position of neighbors—and the

position of one who, *causa lucri* undertakes a dangerous business—and one which in our language had no name. The nearest word we have for it in English is "spy"; and I believe it has been always considered that spies should be hanged. I will refer to the case of *Fowles*, and merely altering the names, will read from the argument of the learned counsel:

"Benton was the friend of Douglass. Douglass had uttered the slander to him, as he says, in *sacred confidence!* How scandalous an abuse of words! But he (Douglass) declined to name his informant; and here, to-day, in his demand for justice, Mr. Ormsby is compelled to rest his case upon the cold, unwilling testimony of Benton, wrung from him by legal coercion."

Now, it does seem to me, on well settled authority, that there is evidence of malice on the ground that the defendant *said too much*, and from the fact that he afterwards repeated it; that there is evidence which should go to the jury. The plaintiff is in circumstances where he must suffer both mentally, in his business and in his character—in everything which a man values—and it is of great importance to him that this question should be passed upon; and that the defendant should either make good his charges, or that a verdict from twelve men should be awarded him.

In every case cited by the learned counsel, so far as I understand it, there was either a duty on the part of the person interrogated to make the response—or there was a duty to protect his own property; as in the case of the servant, it was an imperative duty on the part of the master, for the safety of his household, that a corrupt person should not hold communication with the rest of his family; the same duty that a father has to make his son avoid corrupting influences.

It is conceded, as I understand, that the words are atrocious, and the learned counsel contends that the question of privilege does not depend on the atrocity of the charge. We think it does; that where a man is called upon to give information as to the pecuniary

standing of another, he has no right to charge him with crime.

Judge Pierrepont, preceded his decision by the following remarks:

"Whenever reputation is falsely assailed, the Courts ought to deal with the slander so as to give ample reparation to the individual defamed. For wherever Courts are slow to redress those private grievances, men have taken vengeance into their own hands, and public opinion has sustained them; so will it ever be while men are careful of their reputation, and sensitive to the fair speech of honorable men.

There are, however, in the affairs of life, certain relations which make it absolutely necessary that communications between men of business, in relation to other men, should be protected. They have been known to the common law from its origin, and have been called "privileged communications." As in the case of the employment of a servant: a man desires to hire a servant; he is permitted to ask the former employer the character of that servant, and that communication is called a privileged communication. So a bank is about to be started, and the teller of another bank applies to become the cashier of the new bank; it is proper that the officers should make inquiries of the persons by whom he is employed; and although they may reply that they believe he has secretly taken money from the bank; that they suspect he has made false entries; that they believe he has forged notes; yet, if they communicate this in reply to an inquiry made in good faith, and without any malice, it is a privileged communication, and an action of slander does not lie.

The two question which I deem important in this case are: First, whether this is a privileged communication; and, second, whether there is any evidence of malice on which the Jury are to pass. If four bankers in Wall street should associate themselves together for the purpose of ascertaining the character and standing of their

correspondents in Boston, and should select one of their number, and pay his expenses to Boston for that purpose, and he should, on his return, state that he ascertained Mr. Jones, of Boston, was a man of bad character, that he had committed many outrages against society, that he was a forger; and he communicated that to his four associates in the confidential relation in which they stood—it would be a privileged communication, and no action would lie, unless express malice were shown. Now, it is difficult to see how there would be any difference between four men and twenty-four, or any number, associated for the purpose of gaining honest and truthful information of this description, and without malicious motives; and I am not able to see why the information given by this commercial agency, so far as it appears before the Court, may not come under the class of privileged communications, if made in a proper manner, and without any evil intent or malicious motive, and if made in good faith and honesty.

The evidence of Mr. Benton, who is the only witness that touches the case in the least, is, that he was a subscriber to this commercial agency; that he in writing entered into an agreement with them to keep all the intelligence he received *secret*, and use it for no purpose except his own private protection.

He says that, being a subscriber, he applied for information in relation to Mr. Ormsby, and he filled up a paper which he thinks is like Exhibit No. 2.

"Give us in confidence, and *for our exclusive use and benefit in our business*, whatever information you have respecting the standing, responsibility &c., of Waterman L. Ormsby."

That one of the clerks to whom he applied turned to another; that this clerk examined the books which contained the name of Mr. Ormsby, whose reputation Mr. Benton desired to know, because he wanted to use his note; this clerk turned to another clerk, and that clerk to Mr. Douglass, who gave Mr. Benton the information to which he testified, and which is not creditable to Mr.

Ormsby, and that he was requested not to write it down; that he expressed his surprise and went away; that some time after, he asked Mr. Douglass in relation to this report; he said that on further inquiry, the former information was not much out of the way. He says that the reason Mr. Douglass called on him in relation to the communication afterward, was that Mr. D. said he was the last man to whom he had given the report of Mr. Ormsby; that he had only given it to three or four others. That is all he said; leaving us necessarily to infer that the report which he had given to them was like what he had given to himself, and obtained in the same manner.

The question left is, whether there has been shown any evidence of *express malice:* I holding this to be a priviled communication. If there has been, it must go to the Jury, and there is ground for damages. I imagine, when this case is printed, and the counsel who have tried the case read it free from all the passions which are always elicited in the progress of a trial, and the sympathy which they more or less feel with their clients, they will be surprised to see how little there is in the case from which you can infer the smallest indication of malice.

The urgency of counsel, the statements made to the Jury, and considerations addressed to the Court, in relation to a combination of certain engravers to crush Mr. Ormsby and drive him from his business, were very powerful; and if there was the slightest particle of evidence on the subject, I should not hesitate to put the case to the Jury, with a strong charge in his favor. But they have not offered one word on the subject; it is all left to inference, without any evidence whatever. Consequently we can only take the testimony which has been presented. It does not appear the statement made to Benton ever went out to the world from any one but himself; and the injury which has been done to Mr. Ormsby, so far as this case discloses, has been chiefly done by the witness who has been brought on the stand,

and who was under injunctions of secrecy—under a written promise to keep it secret. In view of the fact that he received this information as a subscriber to this institution, and received it with all the injunctions of secrecy, it is not apparent why he should see fit to publish it to the world. I am satisfied that, so far as the testimony goes, there is no evidence of express malice, and indeed, so far as Mr. Benton's statement is concerned, there is evidence of much caution on the part of Mr. Douglass to try and prevent any undne degree of publicity of this communication. What secret motive there may be, the Court cannot know; we can only act upon the evidence before us; and, I repeat, when that evidence is printed, and the counsel look upon it without any excitement, I am satisfied they will discover there is no evidence of express malice. The only remaining question is, whether this question of express malice is to be left to the Jury. If there is no evidence to go to the Jury, it is not proper for the Jury to speculate about secret motives, of which no evidence has been given."

The following order was entered:

"Motion for non-suit granted. Twenty days' time allowed the plaintiff to make a case—to be heard in the first instance at General Term: all proceedings in the mean time stayed."

The plaintiff appealed from the foregoing order and decision, to the General Term of the Superior Court, and in July, 1859, the said appeal was duly argued, and thereupon the judgment was affirmed.

The nonsuit having been affirmed, on argument before the General Term of the Superior Court, a further appeal was taken to the court of last resort. The judgment was there affirmed for reasons assigned in the opinions of WOODRUFF and MILLER, JJ. See 37 New York Reports, p. 477.

D.

The offices connected with the Mercantile Agency, formerly of Lewis Tappan and now of R. G. Dun & Co., were established at the times and places and in the order following :

New York City.....1841
Boston 1843
Philadelphia 1845
Baltimore.....1846
Cincinnati, Ohio 1849
Louisville, Ky.....1850
St. Louis, Mo.....1850
New Orleans, La.....1851
Charleston, S. C..... 1853
Chicago, Ill.....1854
Pittsburg, Pa.....1854
Detroit, Mich.....1856
Richmond, Va.....1856
London, England 1857
Montreal, Canada.....1857
Cleveland, Ohio 1858
Milwaukee, Wis.....1858
Toronto, Canada 1859
Buffalo, N. Y.....1866
Memphis, Tenn.....1867
Portland, Maine 1867
Halifax, Nova Scotia.....1867
Toledo, Ohio 1868
Albany, N. Y.....1868
San Francisco, Cal.....1869
Norfolk, Va.....1869
Rochester, N. Y.....1870
Hartford, Conn.....1870

DUN, BARLOW & Co.

N. Y., Nov. 29, 1870.

In tracing the extension of our business in each direction, we have named the cities in chronological order, referring to the dates at which each office was commenced. In almost every case the inducement or overture came from the merchants resident in those cities, they subscribing or pledging themselves to support us in advance.

There are now 28 offices and nearly, if not quite, 8,000 regular yearly subscribers, comprising all the leading Banking, Importing, Manufacturing, and Wholesale Merchants in the United States and Canada. Taking the aggregate, all these 28 offices answer fully 4,000 applications for informations every day—about one fifth of them being made in the city of New York. Each inquiry has reference to bus iness transactions actually in contemplation, many of them of great magnitude and importance. The course of business men, in all our cities, requires quick dispatch; and unless we can have the information on hand and on record in readily accessible order and ready for immediate use, it is obvious that the business operations of our customers would be greatly retarded. Our method of procuring the information is as follows:

We have over 10,000 local correspondents. Each of these is made a subject of careful investigation before receiving the appointment. They have small, compact districts (the whole country being thus districted), throughout which they are expected to keep careful oversight, giving us from time to time intimation of all occurances which may seem to them likely to affect the pecuniary interests of creditors. Not to be dependent entirely upon what is furnished by these local correspondents, we employ clerks of our own training, who (generally without knowing the names of local correspondents), travel the country and gather information as to traders seeking credit, which they send to us. We require them to give us the authority for the information communicated. We then carefully compare it with what has previously been furnished by the resident or local correspondent, and where any very material dif-

ference or discrepancy is observable the two reports are submitted to further scrutiny. We also hold ourselves ready at all times to receive, and indeed invite, parties seeking credit to make statements of their own pecuniary resources, as an aid to us in our endeavors to place their claims to credit in a correct light.

We issue annually a circular to subscribers, showing from our varied resources the general state of trade, &c., throughout the country—pointing out causes of any unhealthy symptom, and suggesting remedies. This is accompanied by statistics showing number of failures, and amount of liabilities throughout the country, year by year. These figures were used in Congress, (i. e. quoted) as a basis of argument on which Bankrupt Act was passed.

Departments of the Government have derived advantage from the information furnished by this Agency; and it pays on its correspondence an annual revenue of nearly $30,000 to the post-office.

The judicious care with which the business has been conducted is shown by the record of its litigation, and is embraced in the fact that during the thirty years it has been in operation, only four cases have been prosecuted, viz: Bernard, Ormsby, Billings and Beardsley —the three former decided in our favor—the latter now pending.

The following is a list of all the suits ever brought:

1. *Bernard* v. *Douglass*, was a suit for slander, prosecuted some years ago, in the Superior Court of New York. The plaintiff was non-suited; and he acquiesced in the result.

2. *Billings* v. *Russell*, reported the Boston *Law Reporter*, *Vol.* 8, N. S., page 699, ended in a verdict for the defendant. *See Report Ante p.* 52.

3. *Ormsby* vs. *Douglass*, reported in 37th New York Reports, 477. In this case the plaintiff was non-suited

at the trial, and prosecuted his case through two Appellate Tribunals, ending in the Court of Last Resort, where the non-suit was affirmed.

4. *Allen* v. *Douglass*, was tried in the Court of Common Pleas of Charleston, So. Ca., in May, 1859, before WITHERS, J. The plaintiff appealed, but after the close of hostilities his appeal was abandoned and dismissed.

5. *Middleton* vs. *Tappan & Douglass*, N. Y. Supreme Court, commenced prior to Oct. 23, 1854, and no further prosecuted.

6. *Clark* vs. *Same*, same Court, commenced prior to 1854, and no further prosecuted.

7. *James Scott* v. *Dun, Boyd & Co.*, same Court, commenced 1861. Complaint dismissed for non-appearance of plaintiff.

8. *Stevens* v. *Benj. Douglass* N. Y. Superior Court, commenced and put at issue in 1855, abandoned by plaintiff.

9. *Quimby* vs. *B. Douglass & Co.*, N. Y. Supreme Court, commenced in 1856, put at issue in 1857. Abandoned by plaintiff.

10 *Gitsky* v. *B. Douglass & Co.*, N. Y. Supreme Court, commenced and put at issue in 1857. Abandoned by plaintiffs.

11. *Beman & Cox*, v. *Dun, Boyd & Co.*, N. Y. Supreme Court, commenced in 1861, and abandoned by plaintiffs in same year.

12. Indictment in Philadelphia, on complaint of *O'Brien & Cahill* agst. *R. G. Dun*, for libel in 1870, yet pending.

13. *Pittsfield Woolen Co.* vs. *R. G. Dun & Co.*, N.Y. Supreme Court, commenced in 1870. Yet pending.

14. *Goeppe* v. *R. G. Dun & Co.* Action commenced in Milwaukee, Wis., in 1870. Yet pending.

N. Y., December 5, 1870.

R. G. Dun & Co.

THE MERCANTILE AGENCY.

AN ARTICLE ORIGINALLY PUBLISHED IN

HUNT'S MERCHANTS' MAGAZINE,

for January, 1851.

This institution, which has now been many years in operation, has grown to be so important to the mercantile community, that we feel it dne to our subscribers to notice it in our pages. There are several such agencies in the city of New York. They all have, we presume, the same objects in view, and the same general system of management. Our present remarks, while they are intended to cover the *system*, have reference more particularly to the oldest and most extensive of these agencies, conducted by Messrs. Tappan & Douglass, which we have personally inspected.

This is not only an extensive, influential, and, as we believe, useful institution in New York, but is extended by associate offices to Boston, Philadelphia, Baltimore, Cincinnati, St. Louis, and Louiswille; and contemplates a still farther extension, so as to embrace all the important centers of trade in the United States. But

though known and appreciated by a majority of the mercants in the large cities, we are aware that a prejudice exists against it in some quarters. Our object is, if possible, to remove that prejudice, by presenting the matter to our readers in the light in which it now appears to us. We say *now*, for we are free to acknowledge that our own "first impressions" were unfavorable. On a full examination of the subject, however, we are convinced that those impression were founded in ignorance of the system. We have recently taken pains to inform ouselves, and do not hesitate to say, that the agency is conducted on high and honorable principles, and is truly and extensively useful, not only to the city merchants, for whose immediate benefit it was devised and established, but to all sound, upright, industrious traders throughout the land.

In our review of this system, we shall briefly advert, first, to the *object* of the mercantile agencies, and then to their *operations*

And, first, as to their object. Immediately after the terrible mercantile revulsion, in 1837, when our whole system of internal commerce was prostrate, and nearly all its operators bankrupt, this agency was planned, and put into operation, as a remedy for some of the difficulties which had just been so heavily experienced. Its design was to uphold, extend, and render safe and profitable to all concerned, the great credit system, on which our country had thriven, doing business to an immense amount with all the world, and using the capital of the world to do it with.

At the outset it was mainly intended as an aid to the *Jobber*. His customers, scattered over many States, were periodically visiting him for the purpose of renewing their stocks of goods; generally canceling, in whole, or in part, previous obligations, while they contracted new ones. The intelligent jobber would necessarily need to be informed, on the opening of a new account, respecting the then circumstances of his customer. From year to year he would desire to be freshly advised

of the good or ill success attending him. Information of this character, can, in general, be satisfactorily obtained only at the *home* of the trader. *Hence, the main object with the agency is, to furnish* THE HOME STANDING *of the merchant, obtained from intelligent and reliable sources,* THERE.

If, in his own little circle *at home*, the trader is considered honest, attentive to business, of good business qualifications, and doing well, with a sufficient capital, is not the statement of these facts a positive benefit to himself, and the community in which he resides, as well as to the city merchant from whom he buys his goods. If, on the other hand, the trader is notoriously dishonest, or otherwise so disqualified for business, as to have no credit at home, is it not every way right and proper that it should be known in all those places *away from home*, where he may seek to obtain a credit? Would not the interest of the several parties before referred to be equally consulted, by preventing him from obtaining goods? In both cases, the legitimate ends of healthful trade are alike answered; and the *reporter* has the satisfaction of knowing that he is promoting the real interests of society.

To carry out the credit system, intelligently and safely, the creditor must be well acquainted with the debtor. Confidence, is the life of the system, and confidence can rest only on knowledge. Before the establishment of this agency, our merchants were in the habit of getting such information of their customers as they could, by correspondence or otherwise. Some of the larger houses, whose business would justify the expense, employed travelling agents These they kept constantly out, in different parts of the country, looking after and reporting their debtors, and collecting debts. *The smaller houses were, of course, deficient in the knowledge so necessary* to their success in business, while the larger ones purchased their information at too high a cost. The agency obviates these difficulties. By an extensive and well sustained system of correspondence, extending to every

part of the United States and Canada, it obtains the requisite information respecting every trader in the country, whose business leads him to contract debts away from home. This information is copied in books prepared for the purpose, and held for the use of such merchants as pay for it and want it. It is not made public. *It is not communicated, even to subscribers, except when the trader, by soliciting credit, renders inquiry into his circumstances necessary.* It is made known only to those with whom he proposes to trade. If he does not ask a credit at all, it remains on the record, unread and unseen, from year to year.

It appears, then, that the object of the system is simply to furnish the merchant subscriber with such information as will enable him to judge whether or not, and to what extent he should give credit to parties applying for it—thereby rendering the credit system safe and profitable.

That this is justifiable and right, no one who reflects for a moment will be disposed to deny. The man who seeks to purchase goods on credit, or otherwise to contract a debt, virtually challenges investigation as to his responsibility. The city merchants are always ready to afford facilities to those who may wish to become their customers. They are anxious to sell their goods, and expect to sell the greater part of them on time; and only ask to know who and what the men are, whom they are called on to credit. What reasonable objection can such men make, when inquiry is made as to their property, character, and business qualifications? The banker will not discount a note unless he knows something of the party, or parties, whose names appear on it. And why should the merchant be expected to sell his goods to a man of whom he knows nothing? And how, or where is he to obtain the necessary information? Certainly at the *home* of the trader. There, and there only, can he learn whether he owns property, and is a man of good character—whether he does a legitimate or a speculative business—and whether he is competent, steady, and attentive, or otherwise.

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It is evident that information of this kind must be had, or the credit system greatly curtailed, and, at times, almost wholly abandoned. The man who gives his neighbor credit, does so because he believes he knows him, and has confidence in his integrity and ability to pay. A stranger he will not credit, until, by obtaining the necessary information as to his character, responsibility, &c., he has acquired a degree of confidence which is equivalent to a personal acquaintance. This confidence, and the information on which it is grounded, is the indispensable basis of credit. The buyer knows and feels this, as well as the seller. He does not presume to ask a credit, without showing some reasonable ground for it in his position or property. He knows that the seller will investigate his statement. He cannot, he does not, object to his doing so. If his condition be a healthy one, he is glad to have him do so. It follows, therefore, that the obtaining such information is justifiable and necessary. If the creditor may justly and honorably obtain it for himself, may he not properly employ an agent to do it for him? *Qui facit per alium facit per se.* And may not the merchants of any city, or section, combine to have it all done at a vast saving of time, labor, and expense, by one or more agents?

Having thus briefly stated the *object*, we proceed to glance at the OPERATIONS of the agency, merely premising that our statement and opinions are the result of careful inquiry and personal examination. And here, the first thought that presents itself is this—that the proprietors can have no possible motive for injuring or misrepresenting any man. Their true and only interest is, to get as near as possible to the truth in every report. The least deviation on either side from this standard, may have, nay *must* have an unfavorable influence upon their own prosperity. If they report a man too favorably, and the subscriber, thus induced to trust him, loses his debt, they are blamed. If they report him too unfavorably, and the subscriber thereby loses a good paying customer, they are equally blamed. In fact, the entire success of the

system depends upon the general truthfulness and justice of their records—upon having every report they give out verified by the results to which it leads. This, we are assured, the proprietors fully understand, and act upon to the utmost of their ability, sparing no pains or expense to secure the greatest accuracy in every case.

Having thus the guarantee of the self-interest, as well as of the character of the proprietors it would seem that the subscriber must have confidence in the agency. There is, however, another matter of primary importance—the relialibility of the sources from which information is obtained. That *information* can easily be had, respecting any man, is granted. But, can the agency procure and retain the services of men, as correspondents, whose character and standing in society would entitle them to confidenee. The best proof which can be afforded of the *possibility* of procuring correspondents of the right sort, is, the general accuracy of the reports they furnish. If these, as a whole, are true and reliable, it follows that the parties furnishing them, must be men of judgment, veracity, and *honor*, capable of forming an accurate estimate of their fellow men; and not likely to report a man unfavorably from personal pique, or too favorably from personal friendship. The reports of the agency being so far satisfactory and useful to the mercantile community, as to induce a large and growing subscription to its terms, is proof enough that it has correspondents of this character in all parts of our Union and of Canada. We are informed that the number is but little less than two thousand.

We presume the proprietors do not pretend to infallibility; but we are satisfied that the records of the office are rarely inaccurate, and never seriously so. Indeed, the plan pursued insures accuracy; for they deal *in facts*, and not in opinions. For instance—they record the amount of real estate held by the trader; its incumbrances, if any; whether or not he permits judgments to go against him; whether he speculates, and if so, to a dangerous extent, or otherwise; whether he is attentive to

business, and is capable of managing it ; whether he bears a good character for integrity in his dealings, and promptness in his payments, &c. These facts are made known to the merchant, who is then left to form his own opinion, not only as to the propriety of giving credit, but as to the extent to which it should be given. To illustrate this matter more fully, the following specimens are given, showing the general character of the reports on record, and the kind of information that is sought for. The *names* are, of course, fictitious.

JAMES W. JONES & Co. (JAMES W. JONES, WM. SMITH AND WILLIS R. PHIPPS.)

Ages, 45, 35, and 25. Jones and Phipps are married. All three of good character, business habits, and responsibility. Jones has been in business 15 years—is worth $15,000, of wich $5,000, is in clear real estate. Smith has been in business 10 years, is worth $5,000—has no real estate: Phipps is son-in-law of Jones, was their clerk, and has made $1,500. They keep a stock of about $8,000—are prompt, not speculative, and deemed safe for all their engagements.

William Johnson.—Age 36, single, in business off and on, ten years: formerly Johnson & Stone. Went into Bankruptcy in 1842—began last spring. Habits irregular, worth little or nothing—credit poor.

But again we refer to facts, as evidence on this point. The rapid growth of the agency during the past five years, its vastly increased patronage, and the increasing confidence in it by the merchants in our large cities, are sufficient prrof that the reports furnished are substantially correct, and a safe guide in their credit operations. We have, also *tested* this point on a small scale, but quite to our own satisfaction. We have inquired for parties well known to us, and found the reports, in all cases, in admirable harmony with our own opinion and knowledge of facts.

We think ourselves incapable of saying e word in favor of any system of *espionage*; and, did we believe this to be one, it should have our heartiest condemnation. That it is not, is made sufficiently clear by the nature of the information sought for. The records of the county where the trader resides, which are always open to inspection, furnish an important part of this information. The rest is matter of common observation and remark among his neighbors.

Keeping in view the object of these agencies, we think their system of operations, as far as we have referred to them, admirably adapted for carrying out that object. The city merchant has furnished to him all the information he needs, or desires, at a much cheaper rate than he could procure it for himself, and with a promptness which it would be impossible for him to equal through any other channel. This information is revised and renewed twice a year, and as much oftener, as, in the judgment of the creditors, the case demands. A continuous history of the customer is thus preserved by which the creditor's knowledge of him is made to approximate, as nearly as possible, to a personal acquaintance. If the trader in Eastport, Toronto, Dunkirk, Milwaukie, Richmond, Raleigh, Galveston, or San Francisco, meets with a heavy loss, by fire or otherwise; makes a splendid operation; has property left him; or his note protested;—the fact is immediately communicated to all the associate offices, and by them to the creditors It is not published to the world, but made known only to those, who by having made *special inquiry* for the party, are presumed to be interested in his success. That this is considered a valuable aid to our merchants, is evidenced by the fact that, as we, are informed, some nine hundred of our largest mercantile houses are subscribers to the principal agency; and that the offices in other places are, also, handsomely sustained: while the merchants in cities, yet unprovided for, are anxious for the extension of the system.

A simple inspection of the office in New York is suffi-

cient to satisfy any man, that it is largely and liberally patronized. Shrewd men do not make an expensive show of business merely for effect. Upwards of thirty men are constantly occupied in the details of this office alone, condensing, copying, and giving out reports, carrying on the correspondence, &c., &c. Their records are contained in more than 100 books, of the size of the largest ledger, extending to 600 and 700 pages each.

One other point in the operations, and one of considerable importance, remains to be noticed, and that is its effect upon the country trader. On this point we have expressed the opinion, which is the result of deliberate examination, that the system is as useful to those who seek credit, as to the city merchants who are called upon to give it. It is a well-known fact, that formerly, the trader was confined in his purchases to a few houses, where he might have formed an acquaintance. If wholly unacquainfed, he was obliged to take letters from responsible parties at home, and was limited in his business relations, to the few to whom those letters were addressed. Under the present arrangement, the trader needs no letter of introduction. He is known to the whole list of the agency's subscribers, or, if not known, become so, as soon as he asks a credit. He has the range of the entire market in all the cities where these offices are established: the communication between them being such, that what is known to one is known to all. He need not even leave home to make his purchases. His order is as good as his presence, and will always be promptly met, to the exent of what his intelligent neighbors regard as safe and prudent. This surely is a great advantage, which the honest, capable, and trust-worthy trader cannot fail to appreciate. We are confident, from what we have seen and learned of the working of the system, that the instances in which it enlarges credit to the country trade, are vastly more numerous than those in which it restrains, or prevents it. There are, doubtless, many who, without being aware of it, are now indebted to this agency for a good standing, and a favor-

able position, in places, and with houses, where once they were wholly unknown. Their sphere of operations is enlarged, their business acquaintance increased, and all their facilities for conducting a profitable trade greatly extended.

A second advantage, and by no means a light one, which the country trader derives from this system, is the protection if affords against the unhealthy and injurious competition of fraudulent or incompetent neighbors, in the same business. There is no greater drawback to the success of an honest, industrious tradesman, in a small town or village, *than the irregular, shuffling transactions of a waek, lame, broken-winged, or wingless rival*, who does every thing at haphazard, buying at any price, and selling at any sacrifice, merely to keep up a flow of business, out of which he may manage to live for the time being. There are many grades of such characters in the business world. Some of them are flagrantly dishonest, expecting and willing to fail, now and then, and resolved at all events, to have a living out of any whom they can surprise into trusting them. Some, on the other hand, are well intentioned, but incompetent. Without knowing why, or how, they find themselves, every now and then, in failing circumstances. These are more to be respected than the other class, but scarcely more to be trusted. They are as much in the way of the capable, energetic, well-trained business man's success, as the other. They have no rules to go by; but provide, as they can, for each exigency as it arises. They never know what they are worth, or whether they are worth anything at all; when they open an account or give a note, they never know whether they can pay it or not. They *hope* to pay it, and intend to, *if they can*. The experince of every well-bred merchant and trader can furnish originals for the picture. Against the vexatious and ruinous competition of such men, the mercantile agency is designed and calculated to protect them. It would not *injure* the weak, or the unfortunate; but would commend them to employments which they are capable of managing. Trade is a science, to which many, who

would make excellenct mechanics, or agriculturists, are wholly incompetent.

A third advantage to the capable and enterprising trader, is found in the fact, that he is, by this system, brought very near to his creditor—as it were, always under his eye, and will, consequently, be stimulated to greater watchfulness, care, and circumspection in his business. He will not be so readily tempted into rash speculations, or other irregular transactions, which so often result in disaster and dishonor. It is no discredit, even to an honest man, to say that he is safer under the wholesome restraints, and jealous vigilance of society, than he would be without them. Many a man, with the most upright intentions, and the most confident expectations of a favorable result, has been induced to invest a portion of his means, or to speak more properly, of the means of his creditors, in some promising, but unfortunate enterprise, which he would not have touched if those creditors had been near, and cognizant of the movement. Prudence is the better part, not only of valor, but of thrift; and prudence, like the other virtues, is all the better for being watched.

Under the old system, it was impossible to hold an effective check upon the imprudent speculations of good men, or the swindling speculation of bad ones. Such operations were, in general, known only to those who suffered by them; and the operators having lost credit with *them*, had only to begin again with some new concern, and repeat the operation. Sometimes it happened that a trader, who had run himself out with one set of creditors, would by them be palmed off upon another, as one whom they *had* trusted—the object of the introduction being to get their own pay, in full, by shifting off the debt on their friends.

On all such operations, the agency is an admirable check. The parties reported are known, not to their present creditors only, but to all with whom they seek to open a credit—not in New York alone, but equally in all the cities where the associate offices are established. Such checks we regard as decidedly salutary and whole-

some, and equally so to the well-meaning and prudent trader in the country, as to his prudent creditor in the city.

These principles appear to us so plain and palpable that they need only to be stated. If, among the class of traders, who want more credit than they find themselves able to get, any one is still disposed to object, we take leave to ask on what principles he conducts his own business at home? Does he trust anybody, and everybody, without asking a question? When a stranger comes into the neighborhood, does he open an account with him at once, and to an unlimited extent, without inquiring into his affairs? Does he think it mean, or dishonorable, to send to the place from which the stranger came, and ascertain how far he was regarded worthy of credit *there?* Does he think the former neighbors of the new comer mean, or dishonorable, if they tell him frankly what they think, thereby securing him a good customer, or saving him from a bad one? By no means. The principle is universal. It belongs to the retail credit business, as well as to the wholesale. It governs the trader, selling his hundreds, or thousands, as well as the importer, in selling his tens of thousands, or millions. Confidence, as we have before said, is the life of credit, and knowledge is the life of confidence. Business cannot go on without it, except by dwindling down to a rigid cash, or barter trade.

But it is not *trade* alone that acts upon these principles, and uses these means of applying them. The whole business of banking, marine, fire and life insurances, &c., &c., is conducted in the same way. A man who would take out a policy on his life, must undergo a rigid examination, and answer, in writing, a series of searching and difficult questions, an error, wilful or otherwise, in any one ofwhich, forfeits his policy. He must do more. He must find some personal acquaintance who shall confirm, in writing, the statements he has made. And then, the physician of the company must pass judgment upon the case. After the policy is deli-

vered, the company stillkeeps a watchful eye upon the insured; and in case of death, institutes a rigid scrutiny to ascertain, if possible, whether he had not knowingly the seeds of death in him at the time when the policy was issued.

The same scrutiny is used in fire and marine insurance. Yet nobody feels aggrieved by it. There is not, probably, a single vessel of any importance, that is likely to come into the port of New York, so as to be within the atmosphere of our insurance companies, that is not already fully and minutely described in their registers—the time and place of building, the name of the builder, owner, and master; the quantity of oak, pine, hackmatack: the number and quality of her beams, knees, &c.; with the quantity and weight of iron, or copper, with which she is fastened. Go to an office, and ask the rate of insurance on any particular vessel. They are ready with an answer at once. It is already booked. They know the class and character of the vessel as well as the owner does. Yet nobody complains. It belongs to their business. They could not exist without it.

The same is true with reference to the professions. The very trader who complains of *espionage* on the part of the mercantile agency, when it inquires into his ability and honesty, in giving a note, does the same thing, not only when he takes a note from another, but when he sends that note to a lawyer for collection. He sends it only to one in whom he has confidence that he will pay over what he collects. If he does not know such a lawyer himself, he is careful to inquire till he finds one. The man who expects to be entrusted, to any extent, with the business or property of another, without an inquiry being instituted into all those circumstances which have a bearing on his responsibility and trustworthiness can have had but little experience in the ways of the world. The man who *objects*, to such investigation, gives, in doing so, *prima facie* evidence that the result would be unfavorable to himself.

[*Extract from Hunt's Merchants' Magazine for August*, 1856.]

COMMERCIAL AGENCIES.

No mercantile firm, however well it may be acquainted with its customers, can afford to deprive itself of the important information to be obtained at these agencies. Every step taken independent of them is dangerous. We should as soon think of sailing a ship full freighted into New York harbor without a pilot, as to continue business without the every-day knowledge they impart. Not professing to be infallible, they possess advantages superior to any other system yet introduced.

A commercial agency is a business record office, where all the details are gathered in regard to the character, capital, capacity, and social standing of business men in all sections of the country. These institutions are valuable for the following reasons :—

They frequently warn the city creditor of danger to his interests in some distant part of the country, and furnish him with facilities for protection.

They warn against irresponsible and fraudulent traders, often tracing them from State to State, and recording their movements in each locality.

They aid the solvent country merchant in giving him a credit, and the city merchant in selecting his customers, thus acting as a valuable means of introducing buyers and sellers to each other.

They are disinterested *references* for the country merchant, for it is impossible to find any business in which *honesty* and *interest* are more thoroughly blended.

They throw difficulties in the way of rash speculation and over-trading.

They tend to keep down the cost of goods to the consumer, as without their advantages a larger percentage would necessarily be laid upon goods to leave a margin for bad debts, delays, and extraordinary expense in making collections.

They reduce the *cost*, as well as the *risk* of doing

business with distant parts of the country, as information they furnish would cost probably ten times as much if sought through any other channel.

They tend to produce greater solvency and prosperity among city merchants and business men generally.

They aid sound country merchants, for they throw obstacles in the way of the irresponsible and dishonest, who attempt to buy goods with no reasonable expectation or intention of paying for them—thus protecting honorable dealers from unfair competition.

Commercial agencies, therefore, may be justly called one of the *chief aids* to commeree. They are not local in their influence or benefits, for they extend over the whole country. They are not confined exclusively to merchants. Banks, insurance companies, and business men in every department of trade, can alike participate in their benefits.

These institutions, however, are yet in their infancy. The time will come, we believe, when each of them will be obliged to employ at least one travelling agent constantly in each State, to arrange and keep in perfect order a system which shall, on the wings of the telegraph, keep this great commercial emporium promptly and thoroughly posted in regard to every important change or event in all business circles.

They should know everything that *can be known* about everybody in trade. They should point out wrong-doing in every quarter. They should act as a detective police. They should periodically report, by circular or otherwise, the condition and prospects of business. They should *carefully report the condition of the crops.* They should thoroughly canvass every subject which can influence the commercial prosperity of the country.

We advise every merchant to subscribe to these institutions,—imperfect as they yet are—for *we know* of their value by *actual experience*; and we urge upon each Agency to *perfect* the system they have adopted, until they occupy a position which shall *command* the favor and support of the entire business community.

(Copy.)

We, the undersigned Merchants, Manufacturing, Wholesale and Export Houses in Great Britain and Ireland, being Subscribers to the Branch of The Mercantile Agency in London, for various periods (in some cases extending over ten years), have pleasure in bearing testimony to the worth of that Institution as a valuable aid in extending credit to houses in British America and the United States. We have received from it prompt and reliable information regarding the mercantile standing, character, capital, &c., of business men of various classes and locations, and we confidently recommend its use to the Mercantile and Banking interests, in the assurance that its instrumentality tends largely to the promotion and protection of international trade, and to the convenience and safety of its subscribers.

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